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Supreme Court, U.S.
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No. _____

In The
Supreme Court of the United States

MULLICA WEST, LIMITED
AND PARK TERRACE LIMITED,
Petitioners,

v.

UNITED STATES,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR WRIT OF CERTIORARI

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March 16, 2009

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QUESTIONS PRESENTED

1. Did the court below fail properly to apply the requirements of tender and rejection established by this Court in Franconia v. United States, 536 U.S. 129 (2002), which govern the accrual of a breach of contract claim under ELIHPA, where:

A. No tender of payment was ever made and there was no rejection of tender?

B. The facts developed in the court below establish that there was at least a genuine issue of fact as to whether or not the formulaic documentation established by the Government to qualify for an incentive loan was intended by the parties to operate as a tender and rejection?

RULE 14.1(b) STATEMENT

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Appellants: Tamerlane, Limited; Park Terrace Limited; Park Terrace East Limited; and Mullica West, Limited.

Appellee: United States

RULE 29.6 STATEMENT

Petitioners, pursuant to Rule 29.6, state they are each privately-held limited partnerships. There is no publicly-held corporation which owns more than 10% of the stock of either Petitioner.

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The opinion of the United States Court of Appeals for the Federal Circuit, dated December 22, 2008, is officially reported at 550 F.3d 1135 (2008), and is reproduced at App. A, infra 1a-25a.

The Memorandum Opinions of the United States Court of Federal Claims are officially reported at Tamerlane, Ltd. v. United States, 81 Fed. Cl. 511 (2008); Tamerlane, Ltd. v. United States, 80 Fed. Cl. 724 (2008); and Tamerlane, Ltd. v. United States, 76 Fed. Cl. 512 (2007). They are reproduced at App. B, infra, 26a-34a; App. C, infra, 35a-70a; and App. D, infra, 71a-100a, respectively.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Federal Circuit sought to be reviewed was entered on December 22, 2008. This petition is timely under 28 U.S.C. § 2101(c) and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the opinion and judgment sought to be reviewed. This Court has jurisdiction to review the judgment of the United States Court of Appeals for the Federal Circuit pursuant to 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

The Emergency Low Income Housing Preservation Act of 1987, 42 U.S.C. 1472(c) and 12 U.S.C. §17151 (2000), provides that before the FmHA can accept prepayment of a Section 515 loan, it

> shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

42 U.S.C. § 1472(c)(5)(A)(i).

STATEMENT OF THE CASE

This action was filed by Petitioners, Park Terrace Limited ("Park Terrace") and Mullica West, Limited ("Mullica West"), against Respondent, the United States of America ("the Government"), for damages sustained by reason of the Government's breach of its contractual undertakings with the respective Petitioners to permit prepayment of their mortgages at any time.[1]

Petitioners had entered into loan agreements with the Farmers Home Administration ("FmHA") to establish low income rural housing projects, pursuant to Section 515 of the Federal Housing Act, in 1977 and 1978 respectively. These loan agreements permitted prepayment of the mortgage balance at any time, thereby allowing the project to be removed from the program where its use was restricted to low income housing.

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[1] The action was brought on behalf of two other plaintiffs in addition to Petitioners. Those plaintiffs were granted summary judgment on liability, and their claims were thereafter resolved.

In 1987, Congress enacted the Emergency Low Income Housing Preservation Act of 1987, codified as amended 42 U.S.C. § 1472(c) and 12 U.S.C. § 17151 (2000) ("ELIHPA"), which repudiated the prepayment provisions of those loan agreements, and later enacted the Housing and Community Development Act of 1992 ("HCDA"), codified in relevant part at 42 U.S.C. § 1472(c).

ELIHPA provided that before the FmHA can accept the prepayment of a Section 515 loan, the agency

> shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

42 U.S.C. § 1472(c)(5)(A)(i).

Shortly after ELIHPA was enacted, the Government created an "incentive" program to extend the low income use of the Section 515 projects. The path to incentives was highly orchestrated by agency regulation and replete with mandatory paperwork. Each of the Petitioners submitted what the Government argued in the lawsuit to be a "demand for prepayment" of its loan, which had no restriction on prepayment. After a lengthy process, in 1991 and 1993 Mullica West and Park Terrace each respectively received an incentive loan with a twenty-year use restriction.

On June 22, 2005, suit was brought in the United States Court of Federal Claims. That court had jurisdiction over the case pursuant to 28 U.S.C. § 1491(a)(1). The Government answered the Complaint, raising, as to Petitioners, the affirmative defense of the statute of limitations. Thereafter, the Government brought a motion for judgment on the pleadings, asserting that Petitioners' claims should be dismissed by reason of the bar of the statute of limitations.[2]

Petitioners opposed the motion. They filed Declarations by their Managing Partner, placing of record various relevant facts about the context in which Petitioners went forward with the request for incentives (they were told by the Government they had no other option for relief) and their intention in pursuing the incentives process. Each Petitioner placed of record facts to demonstrate that it did not tender payment or otherwise intend to make a demand which would accrue a breach of the contract on the part of the Government, nor did the Government ever reject a tendered payment. Discovery was later taken, which supported these averments by demonstrating the artificiality of the process by which incentives were applied for and granted. The Government did not rebut those declarations.

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[2] The court converted the motion to one for summary judgment based on the statute of limitations. Thereafter, this Court decided that the statute of limitations was jurisdictional in nature, John R. Sand & Gravel Co. v. United States, 552 U.S. ____, 128 S. Ct. 750 (2008), and the definitive opinion of the Court of Federal Claims below ruled on the Government's motion as subject matter jurisdictional in nature. App., infra, 53a-54a.

The Court of Federal Claims granted the Government's motion and dismissed Petitioners' claims on the basis of the statute of limitations. It held that Petitioners' acceptance of the twenty-year use restrictions in the incentive loans accrued the breach of contract claims and commenced the running of the statute.[3]

On December 22, 2008, the United States Court of Appeals for the Federal Circuit affirmed. 550 F.3d 1135 (2008). It held that Petitioners, by seeking incentives and accepting a twenty-year use restriction, had satisfied the tender and rejection requirements of Franconia v. United States, 536 U.S. 129 (2002) ("Franconia"), and that the intent of Petitioners in pursuing the incentives transaction was irrelevant.

Petitioners petition this Court for review of the Federal Circuit's decision, which held that the tender and rejection requirements of Franconia were satisfied, (a) notwithstanding the absence of tender and rejection, and (b) where no fact-finding as to the context of the transaction had been conducted to determine if the Petitioners had in fact taken purposeful actions with an eye to electing breach.

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[3] See the initial opinion of the Court of Federal Claims dismissing the claims, App., infra, 71a-100a, and the definitive opinion of the Court of Federal Claims, id., 35a-70a. Petitioners also had claims with respect to the periods of time after the twenty-year restrictive use provisions expired. These claims were also dismissed, but their dismissal, which was the subject of the balance of those opinions as well as the opinion of the Court of Federal Claims on the motion to amend judgment, id., 26a-34a, is not the subject of this Petition.

REASONS FOR GRANTING THE PETITION

The Franconia case articulated clear and distinct rules for the accrual of a breach of contract claim under ELIHPA. The court below ignored these standards. It departed from and misapplied this Court's legal standards for claim accrual established in Franconia. Review should be granted because the decision of the Court below is contrary to this Court's precedent on an important federal question, inasmuch as many other owners with projects governed by ELIHPA have rights which may turn on the decision in this case.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT ON THE MEANING OF TENDER AND REJECTION IS IN DIRECT CONFLICT WITH THIS COURT'S CONTROLLING PRECEDENT.

In Franconia, supra, the property owners who received low interest loans from the FmHA, in exchange for providing low-income rental housing in rural areas, brought suit alleging that provisions of ELIHPA, which restricted FmHA's ability to allow prepayments by borrowers, breached their loan agreements. The Government argued the claims were time barred under 28 U.S.C. § 2501, which prescribes that all claims must be filed within six years of the date they "first accrue[d]."

This Court, reversing the United States Court of Appeals for the Federal Circuit (which viewed passage ELIHPA as an immediate breach), held that ELIHPA merely repudiated the loan agreements *rather than*

acted as a present breach. Instead, the claims would accrue when the borrower elected to tender prepayment and the Government rejected the tender, or when the property owner elected to treat the repudiation as a breach by filing suit:

> Accordingly, breach would occur, and the six-year limitations period would commence to run, when a borrower *tenders prepayment* and the Government then dishonors its obligation to accept the *tender* and *release its control* over use of the property that secured the loan.

536 U.S. at 133 (emphasis added). Explaining that ELIHPA functioned as a repudiation, *not* as an immediate breach triggering the accrual of the claim for statute of limitations purposes, id. at 143, this Court held that the repudiation ripens into a breach only when the owner *tenders* prepayment of the loan and the prepayment is *rejected*, or, in the alternative, when the owner elects to treat the repudiation as a breach by bringing suit. Id. at 143-44.[4] This Court concluded that the owners' claims were timely filed "if

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[4] As this Court summarized its analysis:

> [T]he Government's pledged performance is properly comprehended as an obligation to accept prepayment ...
>
> * * *
>
> Unless petitioners treated ELIHPA as a present breach by filing suit prior to the date indicated for performance, breach would occur when a borrower *attempted to prepay*, for only at that time would the Government's responsive performance become due.

Id. at 142-43 (emphasis added).

filed within six years of a wrongly rejected *tender* of prepayment. . . ." Id. at 149 (emphasis added).

This Court also emphasized that the owner, as promisee, has the option to choose the date of breach because repudiation is separate from breach, and ripens into breach as a function of the election of the owner who controls the tender (or the filing of suit). As this Court stated: "Such a repudiation ripens into a breach prior to the time for performance only if the promisee 'elects to treat it as such,'" citing Roehm v. Horst, 178 U.S. 1, 13 (1900). Id. at 143. This Court further quoted from Roehm:

> repudiation "give[s] the promisee the right of electing either to ... wait till the time for [the promisor's] performance has arrived, or to act upon [the renunciation] and treat it as a final assertion by the promisor that he is no longer bound by the contract."
>
> ***
>
> "[I]t seems reasonable to allow an option to the injured party, either to sue immediately, or to wait till the time when the act was to be done, ... which may be advantageous to the innocent party."

536 U.S. at 143, 146, citing Roehm, 178 U.S. at 13, 20.

In that connection, this Court underscored the elective nature of the declaration of breach, also stating:

> "[t]he time of accrual . . . depends on whether the injured party chooses to treat the . . . repudiation as a present breach." 1 C. Corman, Limitation of Actions § 7.2.1, p. 488 (1991). If that party "elects to place the repudiator in breach before the performance date, the accrual date of the cause of action is accelerated from [the] time of performance to the date of such election." Id., at 488-489. But if the injured party instead opts to await performance, "the cause of action accrues, and the statute of limitations commences to run, from the time fixed for performance rather than from the earlier date of repudiation." Id., at 488.

536 U.S. at 144. The corollary of the separation of repudiation and breach necessarily is that mere knowledge of repudiation and the futility of prepayment is not determinative of the accrual of breach, and the promisee is free to take no action at all.

Despite the clarity of the requirements, the Court below held that *in the context of securing incentives*, the writing of a letter which does no more than request to pay off the mortgage, and the acceptance of a use restriction, constituted an election to accrue the breach: "by offering incentive loans in response to [Petitioners'] requests for repayment, the government necessarily rejected the tender and breached its obligation to accept prepayment at any time." App., infra, 17a. In reaching this conclusion, the Court below deviated from Franconia's requirements for the accrual of breach because there was neither tender nor rejection of tender, both as a matter of (1) the text of

the operative documents and (2) the context in which events occurred.

A. The Text Of The Operative Documents Does Not Support Either Tender Or Rejection Of Tender.

Under Franconia, the limitations period begins when the "borrower tenders prepayment and the government then dishonors its obligation to accept the tender and release its control over use of the property that secured the loan." 536 U.S. at 133. This Court must be deemed to have articulated the tender and rejection standards seriously for purposes of determining accrual in a jurisprudential world where (1) mere knowledge of repudiation and the futility of prepayment, and taking no action, is not enough to trigger accrual, but (2) an election of the promisee to convert repudiation into breach must be made.

The court below refused to give this Court's carefully articulated requirements for accrual their requisite dignity. Instead, the opinion of the United States Court of Appeals for the Federal Circuit sought to avoid the plain meaning of this Court's opinion in Franconia by rationalizing that this Court "did not define the contours of the tender and rejection that are sufficient to trigger the six year statute of limitations." App., infra, 14a. Ignoring the well-accepted definitions of tender of payment and without citation to a single authority supporting its definition of tender, the court below held that it was not necessary to attempt "a physical transfer of money" to constitute tender of payment (id. at 15a), that tender and rejection of tender required "no more formalism than the written request to prepay followed by non-acceptance of the

request" (id. at 17a), and that in sum the "degree of formalism in communications" advocated by Petitioners was unnecessary (id.).

The terms used by this Court in Franconia – tender and rejection -- have well-accepted meanings. Tender is an offer to prepay money, without condition.[5] In the context of this case, it involves proffering the outstanding balance of the mortgage, with a demand that the Government release its control over the use of the property. Tender establishes a "bright line" test which insures that accrual of the statute, with the potential for preclusion of rights, gets triggered only *by the purposeful and intentional election to declare a breach*. Implicit in tender is a *demand* that the Government release its control over the property, *i.e.* execute the appropriate releases. See Franconia, supra, 536 U.S. at 142 ("accept prepayment and execute the appropriate releases").

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[5] Black's Law Dictionary defines "tender" as, "An unconditional offer of money or performance to satisfy a debt or obligation." Black's Law Dictionary, 4th Ed. p. 1477-1480 (1999). Hence, a mere written proposal to pay money without offer of cash is not "tender." Williston on Contracts defines tender as follows:

> Stated in alternate terms, tender is an unconditional offer of payment consisting of an actual production of a sum not less than the amount due on a particular obligation; tender must be without conditions to which the creditor can have a valid objection or which would be prejudicial to his or her rights. Tender is the unconditional offer of a debtor to the creditor of the amount of its debt.

Williston on Contracts § 72.27 (4th Ed. 2007).

The request letters of Petitioners, on which the Government relied, did not constitute tender. The November 18, 1991 letter of one Petitioner (Park Terrace) stated:

> This letter will serve as a request to pay off the remaining mortgage balance for the above referenced property.
>
> Please contact me at your earliest convenience to review what procedure should be followed regarding the payoff of the mortgage.

R79. *No tender was made.* The text of the October 11, 1988 letter of the other Petitioner (Mullica West) was the same as the Park Terrace letter. R84.

Likewise, the Government's responses to these letters did not constitute rejection. On June 23, 1992, the Government responded to Park Terrace. R81. The response did not reject the putative prepayment offer. Rather, the Government's letter stated:

> In conjunction with your prepayment request, we are making you, as General Partner for Park Terrace Limited, a one-time offer of an equity loan in the amount of $769,400 as an incentive to keep Park Terrace in low income housing.
> * * *
>
> Any agreement entered into to accept this incentive will require you to sign a restrictive-use provision obligating the housing to the low-moderate income program for 20 years.

Id.; see also, App., infra, 16a.

Similarly, the Government's definitive response to Mullica West on March 14, 1991 did not reject the putative prepayment offer. Rather, the March 14, 1991 letter stated:

> Based on the material submitted, it is the determination of Farmers Home Administration (FmHA) that you have demonstrated the ability to repay your loan in full. As a result of this ability, FmHA is offering a package of one-time incentives so that you may remain in the FmHA multiple family housing loan program in order to extend the low income use of the housing. The following incentives are hereby offered:
>
> 1. A subsequent loan for the equity in the project. The amount of this loan has been calculated to be $3,460,000. * * *
>
> Any agreement entered into to accept these one time incentives will require the signing of a restrictive-use provision obligating the housing to low and moderate income program for 20 years.

R84; see also, App., infra, 16a.

Thus, the letters relied on by the Government to trigger accrual did not satisfy Franconia's requirements. The respective letters by Petitioners *requesting the right* to pay off the mortgages fall far short of a *tender* of prepayment. The request to pay off the balance of the mortgage neither tendered the money, nor did it assert a demand that the property be released from lien. There was no reference to the Government's obligations, or to any imperative that

the Government release the property. There was no assertion of any breach in consequence of the Government's failure to observe the request. No "line was drawn in the sand."

Rather, from a textual standpoint, these letters should be regarded as no different than letters expressing a desire to prepay, posing a hypothetical question about opportunities to prepay and asking for confirmation of the agency's policy concerning prepayment, or questioning with displeasure the effect of the statute. Each represents a form of words falling far short of an unconditional offer to pay the outstanding mortgage balance and require that the Government release its lien. The letters were merely the opening step in the incentives "minuet," sent for an entirely collateral purpose (discussed in the next section) other than laying down the gauntlet of breach.

The court below did not adhere to Franconia's requirement of tender and rejection. It held that the claims accrued by reason of the letters which constituted *neither* tender nor rejection, instead holding that the letters *constructively* met the Franconia requirements. Certiorari should be granted to review the direct conflict between the decision below and this Court's controlling precedent on an important federal question. Supreme Court Rule 10(c).

B. Alternatively, The Court Below Declined To Conduct A Fact-Finding Inquiry Into The Context Of The Putative Prepayment Request And The Putative Rejection.

In reaching its conclusion that the letter requesting payment operated as a "tender," and the Government's

responses as a rejection, the court below ignored the context in which the letters were written. In evaluating compliance with Franconia, supra, the reality of both the tender and rejection are appropriately scrutinized by the court to determine if there existed the requisite intention to constitute the necessary *election* to demand performance.[6] In the face of *bona fide* tender, the Government must reject the tender. The *bona fide* character of the rejection can hardly rise higher than the reality of the underlying tender of prepayment, lest owners merely be placed in the position that the Government's ubiquitous refusals to agree to the *request* for prepayment amount to nothing more than the repudiation effected by the statute itself.

The Court below disregarded the context in which the operative events -- the request for prepayment letters, the responses, and the acceptance of a use

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[6] See Grass Valley Terrace, 69 Fed. Cl. 341, 350 (2005). The court there looked to the Supreme Court's ruling in Franconia, supra, stating that:

> In order to determine whether the FmHA breached the agreement, the court must ascertain the nature of [the property owner's] prepayment request.

Id. at 350. As to one request, the Court held that *even if the property owner had requested prepayment without restriction*, an existing use restriction would have justified the Government's denial of the request, and therefore there was no accrual. Id. at 351. As to the second, the Government informed the claimant that "it must submit additional items," and the court held that the Government's letter "does not even purport to be a denial of Plaintiff's prepayment request and, thus, cannot be a breach." 69 Fed. Cl. at 354.

restriction – took place. In lieu of conducting a fact-finding inquiry, the Court below flatly refused to consider the evidence -- both from the standpoint of Petitioners and from the Government's own documents -- concerning the perfunctory nature of the process which led to the acceptance of a use restriction, the action which it held had accrued the statute.

(1) The Purported Request For Prepayment Letters Were *Pro Forma* And Did Not Constitute A Demand For Performance, Nor Did Their Foreordained Denials Constitute The Rejection Needed To Accrue A Claim.

By reason of the surrounding circumstances, the Government's offer of incentives in exchange for acceptance of a use restriction did not convert repudiation into accrual of Petitioners' claims. As reflected in the Managing Partner's Declarations submitted on behalf of the respective Petitioners, the Government, bootstrapping on its repudiation, informed Petitioners they had no post-ELIHPA option other than to seek "incentives." With the Government holding out incentives as the only alternative available in the face of ELIHPA, a factual inquiry was necessary to determine whether the owner pursuing incentives was trying to do anything other than get incentives -- since the owner's mere knowledge of the futility of repayment would not trigger accrual and since it is possible to want incentives but not intend to prepay or elect breach. It was therefore essential to determine whether what happened represented merely an effort to secure incentives, or a tender and rejection designed to trigger accrual.

As a starting point, Petitioners note that this Court in Franconia, supra, recognized that ELIHPA's implementing regulations had established "a process by which the FmHA addresses prepayment requests." 536 U.S. at 137. As this Court described the process:

> Under those procedures, the FmHA first "develops an incentive offer," making a "reasonable effort . . . to enter into an agreement with the borrower to maintain the housing for low-income use that takes into consideration the economic loss the borrower may suffer by foregoing [sic] prepayment." 7 CFR § 1965.210 (2002). Only if the borrower rejects that offer will the FmHA attempt to make the determinations -- regarding the effect on minority housing opportunities, the displacement of tenants, and the supply of affordable housing in the market -- required by 42 U.S.C. § 1472(c)(5)(G) before prepayment can be accepted. 7 CFR § 1965.215(a) (2002).

Id. Clearly, this Court was aware that the incentives process was agency-driven in which requests for prepayment, designed to secure incentives, were not *ipso facto* the equivalent of tender.

The formulaic incentives process becomes all the more striking, given that by contract Petitioners already had the right to prepay, which they could exercise without having to secure the Government's permission. When ELIPHA became law, and the Government's incentives machinery clanked into motion, that machinery imposed a prepayment request letter as a precondition *to secure incentives*. Clearly, the prepayment request letter -- *asking for permission*

-- stood in marked contrast to an owner *simply exercising the existing right to prepay*. This alone clearly demonstrates that the prepayment request letter was nothing more than a regulatory form.

Here, the *pro forma* letters initiating the formulaic incentive process can hardly be deemed a voluntary election by the property owner to declare a breach and to trigger the accrual of claims. This is all the more true, given the coercive aspect of the incentive process, even if the coercion did not rise to grounds to set aside the transaction itself.[7] Nor can one ignore the dubious value of the "incentives" themselves in evaluating whether owners were making a purposeful *election* to treat the repudiation as a breach.[8]

The prepayment request letters were followed by foreordained and mechanical "denials." These denials were merely an exercise in following the steps prescribed by the Government to secure "incentives."

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[7] In the Franconia proceedings on remand, the Government all but took the position that a claimant was *required* to accept incentives as a "suitable substitute transaction" in order to reasonably mitigate loss. Franconia Assocs. v. United States, 61 Fed. Cl. 718, 741-742 (2004). This position was rejected by the court. Id. at 745.

[8] The Court of Federal Claims in Franconia, supra, termed many of the "incentives" as "feckless, fruitless or just plain risky." 61 Fed. Cl. at 742; id. at 746, note 47. The court also called the incentives "unfunded and dysfunctional options." Id., at 757. It further noted that even where incentives were accepted, they had a "toll charge" -- they were not meaningful options, were underfunded, did not work as intended and represented what amounted to a constructive failure to accept prepayment without offsetting benefit to the owners. Id., at 726-727.

The "denials" can hardly be accorded a greater dignity than the "requests" that preceded them.

The court below declined to allow an inquiry into whether the letters themselves were *bona fide* and whether, given the underlying intent, they could be taken at face value. This undermined the viability of this Court's Franconia accrual standards, and merits review.

(2) Discovery Itself Revealed That The Government Itself Recognized The Letters Were Formulaic And Merely Part Of A Process Orchestrated By The Government To Secure Incentives.

Discovery taken from the Government not only supported the argument that the operative letters were *pro forma*, it revealed that the entire incentives context -- a process orchestrated by the Government to secure the acceptance of incentives by property owners as the sole alternative for relief from repudiation -- relied entirely on artificial communications.

The documents produced by the Government in discovery, specifically regulations and/or drafts thereof, reinforce the position that a letter requesting prepayment did not *ipso facto* act as a demand. That the request and rejection were only scripted is shown by the fact that incentives could be awarded *even if prepayment was not the objective*. As stated in the Government's February 25, 1991 release (R384-R387, at R385-R386):

> III. In accordance with paragraph IV of Exhibit E, every borrower who requests to prepay, and can document the ability to prepay, will be offered an incentive to not do so. The size of the incentive will be based on whether this housing is needed by current tenants and other low- and moderate-income people in the market area, and on the loss to the borrower by remaining in the FmHA program. The size of the incentive may not be based on whether the borrower *actually wishes to prepay or wishes to receive an incentive to not prepay, or on whether the borrower is a servicing problem.*

Emphasis supplied. Thus, this Government document expressly recognized that a borrower who goes through the drill required by the Government in order to get an incentive loan may not actually even want to prepay the loan, despite the execution of the form letter requesting the right to prepay.

Moreover, the Government's incentive program was framed in terms of *incentivizing the borrower not to insist on prepayment* and not to make demand. The very term "incentives" is contradistinct from tender and demand, which are inherently adversarial in nature (drawing a line in the sand). In fact, the program to award incentives was framed in terms of getting the borrower to accept an equity loan *in lieu of prepayment*, *i.e.*, to get the borrower to withdraw the prepayment request through the agency taking an action to "avert prepayment."[9]

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[9] See the March 8, 1991 agency memorandum (R336-A369) regarding Mullica West, at 1, characterizing Mullica West's

Other Government documents also reflect that the incentive process was a measure to *avoid* payment. A January 11, 1989 Government memorandum (R371-R376, at R371), and a January 25, 1990 Government memorandum (R377-R383, at R378), each state:

> Processing Incentives to Avoid Prepayment: After the borrower indicates the intention to accept an equity loan in lieu of prepayment, a loan application must be submitted. This application need not contain all information generally required for a loan, but only the information listed in exhibit A to this AN.

With the Government positioning its incentive program as one "in lieu of" or "to avert" prepayment, the prescribed letters requesting prepayment are the very *antithesis* of a tender of performance. Likewise, the Government's response to the letter requesting prepayment is hardly a meaningful rejection of such a request, since if the demand is not genuine, the rejection can be no more genuine.

Significantly, the Government's regulatory releases avoided any mention of the requirement of *tender* of prepayment. Tender, in accordance with Franconia, would have required a direct response -- acceptance or denial. Instead, the script prescribed that the borrower *request* to prepay. The fact that a borrower could get an incentive irrespective of the desire to

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application as an "application for an equity loan to avert prepayment." R366. See also, the April 19, 1991 memorandum regarding Mullica West titled "Authorization to Obligate Incentives to Avert Prepayment of RRH Loans." R370.

prepay is convincing evidence that a request to prepay made during the incentive process cannot be taken literally, and does not satisfy Franconia's requirements for a claim to accrue.

(3) With Both Sides Treating the Operative Letters As Part of A Formulaic Process To Accomplish Incentives, the Court at the Very Least Should Have Tried the Issue Of the Reality of the Tender and Rejection.

In short, both sides treated the "prepayment" letters and their responses as part of an orchestrated effort to do something other than to tender prepayment and have that tender rejected. The partnerships were submitting paperwork, not a demand to prepay. The Government recognized this, since it created the regulatory context which rendered the letters requesting prepayment mere paperwork.

Given the context, on a scale which measures the degree of elective action for claim accrual purposes, Petitioners, accepting incentives as the only option available to minimize losses under circumstances where they were left no other option, even at the price of accepting a use restriction, should not be deemed to have elected accrual. Their action does not fit any conventional mold of electing "breach." Rather, Petitioners should be regarded as having done the equivalent of taking no action at all -- something which incontrovertibly does not trigger accrual, given the bedrock jurisprudence that no matter how clear the owner's knowledge of the futility of seeking

prepayment, taking no action to tender prepayment and demand performance does not accrue claims.

To assure that the accrual of breach remains meaningful, and to protect the elective character of accrual stressed in Franconia, tender and rejection cannot rise higher than their underlying reality, measured by whether there was a purposeful and intentional *tender* to which there was a meaningful *rejection*. Otherwise, the elective accrual of breach would become the product of the Government providing a script and tracing paper to the property owner, and then trying to have the product recognized as original prose. To allow the mechanistic steps as part of the incentives process to represent the genuine *election* contemplated by Franconia makes a mockery of election and unfairly impacts the owner's substantive rights when the intent was merely to pursue incentives, and doing nothing *would not* have triggered the statute.

In the end, Franconia turns on a purposeful tender of prepayment and rejection of that tender to act as an *election* to declare breach. The *pro forma* prepayment request prescribed by the Government and its mechanical denial were not the product of an intent to declare the Government in breach. The court below vitiated the rigor of the tender and rejection requirements, and obliterated the elective aspect of converting repudiation into breach by precluding any inquiry into the intent and purpose of the actions held to trigger accrual or the context in which those actions took place. Petitioners were entitled to a decision by the factfinder as to whether or not the request to be permitted to pay off their respective loans was

intended to be a tender of prepayment and the Government's response thereto a rejection.

CONCLUSION

In Franconia, supra, this Court held that the repudiation ripens into a breach only when the owner *tenders* prepayment of the loan and the prepayment is *rejected*, or, in the alternative, when the owner elects to treat the repudiation as a breach by bringing suit. Id. at 143-44. This Court then concluded its Opinion by stating that a claim is timely filed if it is filed within six years "of a wrongly rejected *tender* of prepayment." Id. at 149 (emphasis added).

The term "tender" has a well-defined meaning both in blackletter and case law. The court below, without citation to a single authority, completely ignored that body of law and concluded that this Court did not understand the term it had made pivotal in its unanimous ruling in Franconia. Just as the United States Court of Appeals for the Federal Circuit in Franconia had failed to apply traditional contract law in failing to recognize that passage of ELIPHA operated as no more than a repudiation, that same court in the ruling below has again ignored traditional contract law by refusing to give proper meaning to the required tender of payment in order to convert repudiation into breach. In giving a new definition to tender, and allowing accrual of breach to occur even though the owner had never made a tender which had been rejected, the court below failed to apply this Court's decision in Franconia.

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2008-5071

[Filed December 22, 2008]

TAMERLANE, LIMITED, PARK TERRACE LIMITED, PARK TERRACE EAST LIMITED, and MULLICA WEST LIMITED, Plaintiffs-Appellants,	)
v.	)
UNITED STATES, Defendant-Appellee.	)

Before MICHEL, *Chief Judge*, LINN, *Circuit Judge*, and WARE, *District Judge*.*

OPINION

WARE, *District Judge*.

* Honorable James Ware, District Judge, United States District Court for the Northern District of California, sitting by designation.

In 2005, Appellants Park Terrace Limited ("Park Terrace") and Mullica West Limited ("Mullica") filed this lawsuit against the United States alleging, inter alia, that the government had breached loan contracts between itself and the parties. Appellants appeal from a final judgment of the United States Court of Federal Claims dismissing the lawsuit on the ground that the claims accrued in 1991 and 1992 and are, therefore, barred by the six-year statute of limitations of the Tucker Act. *Tamerlane, Ltd. v. United States*, 80 Fed. Cl. 724 (2008). We affirm.

I. BACKGROUND

A. *Factual Background*

1. Mullica and Park Terrace Loans

Sections 515 and 521 of the Housing Act of 1949[1] provide for loans from the Farmers Home Administration of the United States Department of Agriculture ("FmHA") to further the government's interest in providing rental housing for low and moderate income persons. *See Franconia Assocs. v. United States*, 536 U.S. 129, 134 (2002). The loans have favorable interest rates and payment terms. Under the terms of the loans, borrowers agree to preserve the property developed with the FmHA funds for the use and occupancy of low to moderate income tenants "so long as the loan obligations remain unsatisfied." *Id.* The promissory notes associated with the loans contain provisions, however, allowing

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[1] 76 Stat. 671, 82 Stat. 551, codified as amended, 42 U.S.C. §§ 1485, 1490a.

borrowers to prepay the loans at any time, after which they are free to charge market rate rents.

On May 31, 1977, and on November 30, 1977, Appellant Mullica[2] entered into FmHA loan contracts totaling over $ 3 million. The loans have a forty-year maturity period, and are due in 2017. The loan contracts contain the commitment to preserve the property developed with the FmHA funds for the use and occupancy of low and moderate income tenants for the life of the loan but permit Mullica to prepay the loans "at any time at the option of Borrower."

On July 28, 1978, Appellant Park Terrace[3] entered into loan contracts with FmHA, which permitted Park Terrace to take out two loans in the amounts of $ 850,000 and $ 125,000. Final payments on the loans are due on July 28, 2028. The contracts contain a commitment by Park Terrace to restrict use of the rental property and "related facilities for eligible occupants" for the life of the loan but expressly permit Park Terrace to prepay the loan "at any time at the option of the Borrower."

2. Passage of ELIHPA and HCDA

In the years after these and many other similar loans were made pursuant to sections 515 and 521 of the Housing Act, Congress became concerned that increasing numbers of the loans were being prepaid,

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[2] Mullica is a New Jersey limited partnership that used its FmHA loans for a 168-unit rental property.

[3] Park Terrace is a Pennsylvania limited partnership that used its FmHA loans for a forty-five unit rental property.

thus decreasing the available amount of housing for low-to-moderate income occupants. *See Franconia*, 536 U.S. at 135-36. In light of these concerns, Congress passed the Emergency Low Income Housing and Preservation Act of 1987 ("ELIHPA")[4] and the Housing and Community Development Act of 1992 ("HCDA").[5] ELIHPA "amend[s] the Housing Act of 1949 to impose permanent restrictions upon prepayment of § 515 mortgages entered into before December 21, 1979." *Id.* at 136. ELIHPA mandates that before the FmHA can accept prepayment of a section 515 mortgage,

> the [FmHA] shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities for not less than the 20-year period beginning on the date on which the agreement is executed.

42 U.S.C. § 1472(c)(4)(A).

ELIHPA provides that "the FmHA may include incentives in such an agreement, including an increase in the rate of return on investment, reduction of the interest rate on the loan, and an additional loan to the borrower." *Franconia*, 536 U.S. at 136 (citing 42 U.S.C. § 1472(c)(4)(B)). If, however, after a "reasonable period" an agreement cannot be reached between the borrower and the FmHA, the borrower seeking

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[4] Pub. L. No. 100-242, 101 Stat. 1877 (1988).

[5] Pub. L. No. 102-550, 106 Stat. 3672 (codified in relevant part at 42 U.S.C. § 1472(c)).

prepayment must "offer to sell the assisted housing and related facilities involved to any qualified nonprofit organization or public agency at a fair market value." 42 U.S.C. § 1472(c)(5)(A)(i). An offer of prepayment may be accepted if such an offer to buy the property is not made within 180 days.[6] *Id.* § (c)(5)(A)(ii). The regulations implementing ELIHPA create a process for the FmHA's determination of prepayment requests, by which the FmHA "'develops an incentive offer,' making a 'reasonable effort . . . to enter into an agreement with the borrower to maintain the housing for low-income use that takes into consideration the economic loss the borrower may suffer by foregoing [sic] prepayment.'" *Franconia*, 536 U.S. at 137 (quoting 7 C.F.R. § 1965.210 (2002)). If no such agreement can be reached, the FmHA will proceed to make the requisite statutory determinations before any prepayment can be accepted. *Id.*

3. Mullica and Park Terrace Prepayment Requests

On October 11, 1988, Mullica sent a letter to the FmHA stating, "[t]his letter will serve as a request to pay off the remaining mortgage balance for [Mullica West Apartments]." On March 30, 1989, the FmHA responded that, "[a]fter careful consideration, [the FmHA] is unable to accept your offer to prepay the loan on Mullica West Apartments at this time." The letter further advised Mullica of its right to participate

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[6] Under certain circumstances, not relevant to the facts of this case, the offer-for-sale requirement may be avoided. *See* 42 U.S.C. § 1472(c)(5)(G).

in an appeal process and of "the opportunity to review any incentives not to prepay."

On March 14, 1991, the FmHA informed Mullica that, "[b]ased on the material submitted, [Mullica had] demonstrated the ability to pay [its] loan in full." "As a result of this ability," the FmHA offered Mullica an incentive loan package that required Mullica to sign "a restrictive-use provision obligating the housing to low and moderate income use for 20 years."

After further correspondence, on June 18, 1991, Mullica took out an FmHA incentive equity loan. Mullica's incentive loan agreement provides:

> The borrower and any successors in interest agree to use the housing for the purpose of housing very low-, low- and moderate-income people eligible for occupancy as provided in FmHA regulations then extant during this 20 year period beginning on the date of this mortgage instrument. . . . No person occupying or wishing to occupy the housing shall be required to vacate or be denied occupancy prior to the close of such 20 year period because of early repayment.

The "20-year use restrictions" of the incentive loan obligate Mullica to maintain the financed housing for low-to-moderate income renters until 2011. Mullica's incentive loan matures in 2036.

On November 19, 1991, Park Terrace sent a letter to the FmHA stating, "[t]his letter will serve as a request to pay off the remaining mortgage balance for the [Park Terrace Apartments]." The FmHA responded

on June 23, 1992, with a letter stating, "[i]n conjunction with your prepayment request, we are making you . . . a one-time offer of an equity loan. . . . as an incentive to keep Park Terrace in low income housing . . . Any agreement entered into to accept this incentive will require you to sign a restrictive-use provision obligating the housing to the low-moderate income program for 20 years."

On July 16, 1993, after an ensuing application process, Park Terrace took out a new incentive equity loan in the amount of $ 925,000, which carried a low fixed interest rate. Park Terrace's incentive loan matures in fifty years. The Park Terrace incentive loan agreement contains the following clause:

> The borrower and any successors in interest agree to use the housing for the purpose of housing low- and moderate-income people eligible for occupancy as provided in Section 515 of Title V of the Housing Act of 1949 and FmHA regulations then extant during this 20 year period beginning the date of this mortgage. . . . No person occupying or wishing to occupy the housing shall be required to vacate or be denied occupancy prior to the close of such 20 year period because of early repayment.

The "20-year use restrictions" of the incentive loan obligate Park Terrace to maintain the housing for low and moderate income renters until 2013. The Park Terrace incentive loan matures in 2043.

B. *Procedural History*

On June 22, 2005, Park Terrace, Mullica and two other borrowers[7] filed a Complaint in the United States Court of Federal Claims, alleging breach of contract and a "takings" claim, and seeking damages for lost profits for the period ELIHPA prevented them from converting their properties from low-moderate income housing to market-rate rental housing. The Complaint alleged that, by denying Plaintiffs the opportunity to prepay the FmHA loans in direct violation of the express terms of their respective loan agreements, the government, through ELIHPA, unlawfully tied Plaintiffs to the use restrictions contained in those agreements.

In its Answer, the government alleged, as an affirmative defense, that the claims of Park Terrace and Mullica[8] were barred by the statute of limitations contained in the Tucker Act.[9] The government

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[7] The original plaintiffs were Tamerlane, Ltd. and Park Terrace East, Ltd., as well as Park Terrace and Mullica.

[8] Statute of limitations was not raised as an affirmative defense as to Tamerlane or Park Terrace East.

[9] The Tucker Act empowers the Court of Federal Claims "to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States. . . ." 28 U.S.C. § 1491(a)(1). With respect to the statute of limitations for such claims, the Act provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501.

contended that the claims alleged in Mullica and Park Terrace's 2005 Complaint had accrued when the FmHA denied their offers of prepayment in 1991 and 1992, respectively, and on that ground, the government moved for judgment on the pleadings. In response, Mullica and Park Terrace contended that (1) their prepayment requests did not trigger the statute of limitations or, alternatively, (2) that even if the statute was triggered and had run on the 1991 and 1992 prepayment offers, the statute has not extinguished any claim that they might bring for failure of the government to allow prepayment in the so-called "extended period," referring to the period of time in the future between the end of the twenty-year use restrictions contained in the incentive loans and the date the original loans mature.[10]

In response to the government's motion for judgment on the pleadings, the Court of Federal Claims issued the first in a series of three orders.

1. *Tamerlane I*

On May 18, 2007, the Court of Federal Claims issued an order and opinion on the government's

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[10] Specifically, Park Terrace's original loan matures in 2028, but the use restriction contained in Park Terrace's 1993 incentive loan ends in 2013. Mullica's original loan matures in 2017, but the use restriction contained in Mullica's 1991 incentive loan ends in 2011. Accordingly, there is a fifteen-year gap between the end of Park Terrace's use restriction and the maturity of its original loan, and a similar six-year gap between the end of Mullica's use restriction and the maturity of its original loan. These are the so-called "extended periods."

motion for judgment on the pleadings.[11] *Tamerlane, Ltd. v. United States*, 76 Fed. Cl. 512 (2007) ("*Tamerlane I*"). Based on the holding in *Franconia*, the court found that Park Terrace and Mullica's prepayment requests and the government's subsequent offers of incentive equity loans accrued the government's breach of the underlying loan agreements. *Id.* at 523. Accordingly, the court held that Mullica's claim had accrued in 1991 and Park Terrace's in 1992. With respect to the extended period claims, the court held that the claims were unaccrued as unvested prepayment rights. *Id.*

After the Court of Federal Claims issued its order in *Tamerlane I*, Park Terrace and Mullica asked the court to reconsider the statute of limitations issue, as well as for permission to take documentary discovery with respect to their claims on the primary loan periods. The court granted those motions.

2. *Tamerlane II*

On February 29, 2008, the Court of Federal Claims issued its definitive opinion on Mullica and Park Terrace's claims. *Tamerlane, Ltd. v. United States*, 80 Fed. Cl. 724 (2008) ("*Tamerlane II*"). Since matters outside of the pleadings had been presented for consideration, the Court of Federal Claims treated the motion as one for summary judgment. The court affirmed the holding of its *Tamerlane I* opinion with

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[11] In *Tamerlane I*, the court treated the government's motion as one for summary judgment because it relied on matters outside of the pleadings.

respect to accrual of the statute of limitations in 1991 and 1992. *Id.* at 735.

With respect to the viability of Appellants' claims in the so-called extended period, in *Tamerlane II*, the court found that those claims should be considered in the context of the continuing claims doctrine. *See* 80 Fed. Cl. at 735-37. The court reversed its earlier finding on this issue, and held that "[w]hile Park Terrace and Mullica seek compensation for a contractual right that promised performance into the future . . . a single repudiation made clear the [g]overnment's intent to dishonor the terms of the contract." *Id.* at 737. Accordingly, the court held that "[a]ny subsequent or continuing denial by the government of responding to plaintiffs' rights to prepay their loans and exit the program pursuant to ELIHPA does not give rise to a new cause of action, but flows from the government's original repudiation and later breach occurring in 1992 and 1991." *Id.* Thus, in reversing its *Tamerlane I* finding on the extended period claims, the court determined that these claims were also barred by the six-year statute of limitations.

3. *Tamerlane III*

After both primary period and extended period claims were dismissed by the Court of Federal Claims in *Tamerlane II*, Park Terrace and Mullica filed a motion to amend judgment, solely with respect to the extended period claims. On April 3, 2008, the court issued its Order on Motion to Amend Judgment. *Tamerlane, Ltd. v. United States*, 81 Fed. Cl. 511 (2008) ("*Tamerlane III*"). The court found that Plaintiffs' "motion appear[ed] to advance claims for

breach of the incentive equity loan contracts"[12] and not just breach of the original pre-1979 loan agreements. *Id.* at 513. The court held that the parties' "June 22, 2005 complaint is not reasonably susceptible [to] amendment to assert breach of contract claims with respect to the incentive equity loans, as such claims would appear to state separate and independent causes of action." *Id.* at 513 n.1. Accordingly, the court denied the motion to amend judgment as to the extended period claims. *Id.* at 513-14.

This appeal followed. We have jurisdiction pursuant to 28 U.S.C. § 1295(a)(3).

II. DISCUSSION

A. *Standard of Review*

We review judgments of the Court of Federal Claims de novo with respect to questions of law, and for clear error with respect to findings of fact. *Applegate v. United States*, 25 F.3d 1579, 1581 (Fed. Cir. 1994); *Milmark Servs., Inc. v. United States*, 731 F.2d 855, 857 (Fed. Cir. 1984). A grant of summary judgment is reviewed "for correctness, determining whether the matter was amenable to summary resolution and, if so, whether the law was correctly applied to undisputed facts." *Mass. Bay Transp. Auth.*

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[12] In Plaintiffs' motion to amend judgment, Plaintiffs contended that the court's dismissal of their "extended period" claims "deprived [them] of a remedy for the breach of the second contract, which came into existence only *after* the putative demand and refusal to perform had accrued the rights to sue for the breach of the first."

v. United States, 129 F.3d 1226, 1230-31 (Fed. Cir. 1997).

B. *Analysis*

Appellants contend that the Court of Federal Claims (1) erroneously determined the date of accrual of Appellants' breach of contract claims, and (2) erred in failing to allow Appellants leave to amend their Complaint to add claims under the incentive loans for the extended period. We consider each issue in turn.

1. Occurrence of Breach

Appellants contend that the Court of Federal Claims erred as a matter of law by misapplying the Supreme Court's governing *Franconia* precedent to the transactions at issue in this case. According to Appellants, the Court of Federal Claims erroneously found that Appellants' acceptance of the use restrictions in the incentive loans accrued their breach of contract claims, and, in doing so, "erroneously disregarded the textual limitations of the operative documents relied on by the government, as well as their pro forma nature and the artificiality of the process in which they were generated."

In *Franconia*, the Supreme Court held that ELIHPA's enactment "qualified as a repudiation of the parties' bargain, not a present breach of the loan agreements." 536 U.S. at 133. As a consequence, "breach would occur when a borrower attempted to prepay, for only at that time would the [g]overnment's responsive performance become due." *Id.* at 143. In other words, the "time of accrual [of a claim] depends on whether the injured party chooses to treat the

repudiation as a present breach." *Id.* at 144. The six-year statute of limitations commences "when a borrower tenders prepayment and the [g]overnment then dishonors its obligation to accept the tender and release its control over use of the property that secured the loan."[13] *Id.* at 133.

The main thrust of Appellants' contentions is that the Court of Federal Claims erred as a matter of law by misapplying *Franconia's* requirement of tender of prepayment and rejection by the government. In particular, Appellants take issue with the Court of Federal Claims' treatment of

> the acceptance of the twenty-year use restriction as tantamount to the government's rejection of a demand for performance, [when it held] that the [g]overnment's offer of incentives in exchange for an agreement by borrowers to extend the restrictions on their properties constitutes precisely the breach and accrual that *Franconia* contemplated.

In *Franconia* the Court did not define the contours of the tender and rejection that are sufficient to trigger the six-year statute of limitations. We now clarify whether the circumstances of this case were sufficient to constitute a breach under *Franconia*.

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[13] ELIHPA can also be treated as a present breach by filing suit prior to the date indicated for performance. *Franconia*, 536 U.S. at 143.

a. The text of the operative documents

Appellants contend that the operative documents relied on by the Court of Federal Claims neither tendered prepayment nor rejected tender. The letters submitted to the FmHA in 1988 by Mullica and in 1991 by Park Terrace each state that "[t]his letter will serve as a request to pay off the remaining mortgage balance for the above property." Appellants' contention that this does not constitute "tender" within the meaning of *Franconia* relies on the definition of "tender" from *Black's Law Dictionary* 1477-80 (4th ed. 1999), which states that "tender" is "an unconditional offer of money or performance to satisfy a debt or obligation." Appellants also look to *Williston on Contracts*, which defines "tender" as "an unconditional offer of payment consisting of an actual production of a sum not less than the amount due on a particular obligation." § 72.27 (4th ed. 2007). Appellants assert that the 1988 and 1991 letters did not constitute "tender," because they were only "requesting the right to pay" in a perfunctory manner and did not actually tender money or assert a demand to release the property from the use restrictions.

Although the Supreme Court did speak in terms of "tendering payment" in *Franconia*, the *Franconia* decision is not authority for "tender" being satisfied only by the highly formalized and technical process advanced by Appellants. *See* 536 U.S. at 133. The *Franconia* Court also stated that "breach would occur when a borrower attempt[s] to prepay" and that the government's obligation was ultimately to "accept prepayment." *Id.* at 143. The *Franconia* opinion does not suggest that a physical transfer of money must be attempted in order to constitute a tender of payment.

Under the terms of the original loans, Mullica and Park Terrace had an unconditional right to prepay the loans at any time, and the government had a corresponding unconditional obligation to accept prepayment. The 1988 and 1991 letters sent by Mullica and Park Terrace to the government were clear, unconditional offers of prepayment sufficient to trigger a duty by the government to accept the tender under the terms of the pre-1979 loans.

In the alternative, Appellants contend that even if the letters requesting to prepay the loans are regarded as tenders, the government's response letters were not rejections sufficient to trigger breach under *Franconia*.

The government's responses to Mullica and Park Terrace did not explicitly state that the offers of prepayment were "rejected."[14] However, the

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[14] With respect to Mullica, the government's initial response letter on March 30, 1989, declared that "[a]fter careful consideration, [FmHA] is unable to accept your offer to prepay the loan on Mullica West Apartments at this time." In a subsequent letter on March 14, 1991, the government stated:

> Based on the material submitted, it is the determination of [FmHA] that you have demonstrated the ability to repay your loan in full. As a result of this ability, FmHA is offering a package of one-time incentives so that you may remain in the FmHA multiple family housing loan program in order to extend the low income use of the housing.

Similarly, the government responded to Park Terrace on June 23, 1992, with a letter stating that, "[i]n conjunction with your prepayment request, we are making you . . . a one-time offer of an equity loan . . . as an incentive to keep Park Terrace in low income housing."

government did not accept those offers. Pursuant to ELIPHA, instead of accepting prepayment, the government offered incentive loans. ELIHPA provides that, in lieu of accepting prepayment, the government make "reasonable efforts to enter into an agreement with the borrower," by which the borrower would be offered incentives to keep the property committed to low-income uses. *See* 42 U.S.C. § 1472(c)(4)(A)-(B). In other words, by offering incentive loans in response to Appellants' requests for prepayment, the government necessarily rejected the tender and breached its obligation to accept prepayment at any time. This conclusion is reinforced in the case of Mullica, given that the government's offer of incentives was preceded by a letter in which the government expressly declined to accept prepayment.

The degree of formalism in communications for which Appellants advocate is unnecessary given Congress' clear repudiation of the unfettered right to prepay in ELIPHA. When the government responded to Appellants' requests to prepay with offers of incentive loans, those offers were functionally co-extensive with a rejection of prepayment. The *Franconia* decision requires no more formalism than the written request to prepay followed by non-acceptance of the request by the government to trigger the running to the statute of limitations. Although other conduct could constitute breach by the government, the Court of Federal Claims correctly ruled that at least by 1991 and 1992, the dates the Appellants entered into ELIPHA incentive loans, breach-triggering rejections had occurred.

b. The context surrounding the operative events

Relatedly, Appellants contend that the Court of Federal Claims erred by refusing to consider evidence concerning the context of the actions that it held had accrued the claims. The primary thrust of this contention is that the requests for prepayment were "pro forma" and were part of a "charade" designed to secure incentives in lieu of insistence on prepayment. In other words, Appellants contend that the prepayment letters were just part of a mechanical process to get incentives, and were never intended to declare the government in breach of the underlying loan agreements.[15]

In support of this theory, Appellants cite a number of government documents that speak in terms of "incentives to avert prepayment" of the FmHA loans. Appellants also rely on FmHA Guidelines for Accepting Prepayment in Order to Ensure Tenant Protections, which state:

> [E]very borrower who requests to prepay, and can document the ability to prepay, will be offered an incentive not to do so. The size of the incentive will be based on whether this housing

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[15] We reject this argument because it appears to rely on the subjective intent of the parties with respect to whether there was a "tender." As with general contract principles, the subjective intent of the parties is immaterial to whether a contract has been breached. *See Navair, Inc. v. IFR Ams., Inc.*, 519 F.3d 1131, 1138-39 (10th Cir. 2008). Appellants fail to cite any authority for the proposition that the determination of performance or breach of a contract is based on the subjective intent of the parties.

> is needed by current tenants and other low- and moderate-income people in the market area, and on the loss to the borrower by remaining in the FmHA program. The size of the incentive may not be based on whether the borrower actually wishes to prepay or wishes to receive an incentive not to repay, or on whether the borrower is a servicing problem.

Appellants suggest that this passage from the Guidelines evidences a "charade" because of its reference to offering incentive loans under circumstances where the borrower might not actually wish to prepay but offers to do so in order to qualify for an incentive loan. Appellants are misreading the Guidelines. The cited language instructs that the "size" of the incentive should be independent of the motivation or payment history of the borrower and does not transform the process into a charade.

Further, Appellants' assertions that their prepayment requests and the government's response letters were "mere paperwork" in the context of a charade, in which they never intended to call the government into breach, are undermined by the allegations in their own Complaint. For example, the Complaint alleges:

> But for the [g]overnment's conduct, plaintiffs would have terminated their contracts by prepaying their mortgage loans. As a consequence of the [g]overnment's conduct, certain of the plaintiffs have submitted applications for prepayment and/or an offer of "incentives" from the [g]overnment. The [g]overnment has in every instance refused to

> accept prepayment from plaintiffs pursuant to the provisions of their contracts. Those plaintiffs have been compelled to change their position to their detriment in reliance upon the [g]overnment's repudiation, including accepting "incentives" in lieu of a sale at fair market value.

The allegations in the Complaint suggest both that Appellants desired to prepay their FmHA loans and that their requests to do so were rejected by the government. The Complaint speaks of the incentives as a form of detrimental reliance, not as something Appellants sought to secure in the absence of any attendant desire to repay their loans.

Accordingly, we affirm the Court of Federal Claims' determination that the transactions underpinning Appellants' acceptance of incentive loans triggered breach of the original loan agreements and commencement of the six-year statute of limitations. As a consequence, the six-year statute of limitations expired in 1997 for Mullica and in 1998 for Park Terrace.

2. Claims during the extended period

Appellants alternatively contend that the Court of Federal Claims erred as a matter of law by misapplying *Franconia* to the so-called "extended period" and abused its discretion by not granting Appellants' request to amend their Complaint to add extended period claims. Appellants' "extended period" contention appears to involve two distinct periods: (1) the term of the pre-1979 loans that will remain unexpired following the end of the twenty-year use

restrictions agreed upon by Appellants in the incentive loans, and (2) claims based on breach of the incentive loans themselves.

a. Claims under the pre-1979 loans during the extended period

As described above, the twenty-year use restriction of the incentive loan obligates Mullica to maintain the financed housing for low-to-moderate income renters until 2011. However, the incentive loan did not supplant the pre-1979 loans to Mullica and the restrictions are in effect until 2017.

Similarly, the twenty-year use restriction of the incentive loan obligates Park Terrace to maintain the housing for low and moderate income renters until 2013. Concurrently, the original 1978 FmHA loans to Park Terrace are still outstanding and restrict use for eligible tenants until 2028.

Appellants contend that, even if there were tender and rejection of prepayment when Appellants took the incentive loans, the bar of the statute of limitations should only extend to the end of the twenty-year restriction period because any rejection of prepayment occurred only to the extent of the use restriction. Appellants assert that new opportunities to prepay the original loans occur between 2011 and 2017 as to Mullica, and between 2013 and 2028 as to Park Terrance, because during those periods the use restrictions will have expired, which Appellants contend necessarily implies a new opportunity for breach through tender and rejection.

The Court of Federal Claims analyzed Appellants' contention, namely, that a new limitations period arose for any refusal to allow prepayment, under the continuing claims doctrine. This doctrine applies where a plaintiff's claim is "inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997). The doctrine allows "later arising claims even if the statute of limitations has lapsed for earlier events."[16] *Tamerlane II*, 80 Fed. Cl. at 736 (quoting *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 879 (Fed. Cir. 1998)). The Court of Federal Claims found that the continuing claims doctrine was inapplicable to Appellants' alleged "extended period" because "a single repudiation made clear the [g]overnment's intent to dishonor the terms of the contract" and that "[a]ny subsequent or continuing denial . . . of [Appellants'] right to prepay their loans . . . does not give rise to a new cause of action, but flows from the [g]overnment's original repudiation and later breach occurring in 1992 and 1991." *Tamerlane II*, 80 Fed. Cl. at 737.

We find that the Court of Federal Claims correctly determined that Appellants have no remaining viable claim for a failure to allow prepayment of the original pre-1979 loans in the extended period or otherwise. As *Franconia* held, the enactment of ELIHPA constituted a repudiation of Appellants' FmHA loan agreements. Breach of those agreements arises upon tender of

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[16] Appellants themselves do not expressly rely on the "continuing claims doctrine."

prepayment and subsequent government rejection of that attempted prepayment. 536 U.S. at 143. *Franconia* in no way tied the breach of the original contract to the terms of a subsequent incentive contract. In this case, Appellants appear to improperly conflate the government's breach of the *original* loan agreements with the use restrictions that arose from the *incentive* loan agreements. That is, there is no second opportunity for breach of the original agreements just because the incentive agreements contain time-limited use restrictions. As the Court of Federal Claims correctly found, there was a single agreement that was breached on a single occasion, which does not allow any sort of "continuing claims" to be brought under the prevailing law of this Circuit.[17]

b. Claims under the incentive loan agreements

Appellants contend that the Court of Federal Claims erred in its ruling with respect to dismissing their claims for breach of the incentive loans during the so-called extended period. The claims on account of the extended period seek relief for the breach of the

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[17] This situation is analogous to that in *Ariadne*, where we were confronted with a plaintiff who sought compensation from the government for repudiation of a contract that promised continuing performance into the future. 133 F.3d at 879. In finding that a single statutory repudiation made clear the government's intent to reject the terms of the contracts, we held that each subsequent denial of the promised contractual benefits did not give rise to a separate cause of action, and found that the continuing claims doctrine did not permit the plaintiff to obtain a second limitations period where the limitations period on the original breach had already expired. *Id.*

right to prepay the incentive loans after the twenty-year restriction period expires.

In addressing Appellants' contention with respect to an alleged breach of the incentive loans, the Court of Federal Claims clearly stated that its "opinions do not purport to dismiss any claims asserting breach of incentive equity loan contracts, as the complaint did not plead those claims." *Tamerlane III*, 81 Fed. Cl. at 513 n.2.

We find that the Court of Federal Claims correctly ignored Appellants' contentions relating to an alleged breach of the incentive loans. Appellants' Complaint does not make any allegations relating to the incentive loans.[18]

Accordingly, the Court of Federal Claims' failure to address Appellants' extended period claims based on the incentive loans is affirmed.

c. Leave to amend Appellants' Complaint

Finally, Appellants contend that the Court of Federal Claims erred by not permitting them to amend their Complaint to include claims for the extended period. From Appellants' papers, however, it is not

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[18] Appellants seem to misapprehend the law in this regard, as they state in their brief that, "[s]ince the [g]overnment will deny the right of prepayment when the restrictions expire in 2013 and 2011, the filing of this suit acted to accrue the independent breach of those rights." There does not, however, appear to be any legal principle by which a plaintiff can sue for breach of contract based on a plaintiff's presumption that a defendant will later breach a contract between the two parties.

clear to which extended period they are referring. Treating the proposed amendment as applying to the incentive loans, the Court of Federal Claims found that the Complaint was "not reasonably susceptible [to] amendment to assert breach of contract claims with respect to the incentive equity loans, as such claims would appear to state separate and independent causes of action." *Tamerlane III*, 81 Fed. Cl. at 513 n.1.

"The decision to grant or deny a motion for leave to amend . . . lies within the sound discretion of the trial court." *Insituform Techs., Inc. v. Cat Contracting, Inc.*, 385 F.3d 1360, 1372 (Fed. Cir. 2004). We find that there was no abuse of discretion by the Court of Federal Claims in denying leave to Appellants to introduce separate and independent causes of action. Accordingly, the Court of Federal Claims' denial of leave to amend is affirmed.

III. CONCLUSION

For the aforementioned reasons, we affirm the judgment of the Court of Federal Claims.

AFFIRMED

APPENDIX B

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 05-677C

[Filed April 3, 2008]

TAMERLANE, LIMITED, PARK TERRACE LIMITED, PARK TERRACE EAST LIMITED, and MULLICA WEST LIMITED, Plaintiffs,	)
v.	)
THE UNITED STATES, Defendant.	)

JUDGES: Christine Odell Cook Miller, Judge.

ORDER ON MOTION TO AMEND JUDGMENT

MILLER, Judge.

On February 29, 2008, this court issued its supplemental opinion to the May 18, 2007 opinion dismissing for lack of subject matter jurisdiction the breach of contract claims of plaintiffs, Park Terrace Limited ("Park Terrace") and Mullica West Limited ("Mullica") (collectively, "moving plaintiffs"), and

dismissing Count II of the complaint as to all four plaintiffs on the merits. *See Tamerlane, Ltd. v. United States*, 80 Fed. Cl. 724, 2008 WL 590876 (Feb. 29, 2008); *Tamerlane, Ltd. v. United States*, 76 Fed. Cl. 512 (2007). On March 14, 2008, plaintiffs Park Terrace and Mullica moved to amend the judgment pursuant to Rule 59 of the Rules of the Court of Federal Claims. Defendant filed its response on March 24, 2008.

FACTS

A full explication of facts and background, set forth in the court's May 18, 2007 opinion and February 29, 2008 supplemental opinion, is unnecessary. Recitation of the facts germane to the parties' contentions is incorporated into the discussion.

DISCUSSION

1. *Standard of review on motion to amend judgment*

RCFC 59(a)(1) provides that the court may grant "[a] new trial or rehearing or reconsideration . . . to all or any of the parties and on all or part of the issues, for any of the reasons established by the rules of common law or equity applicable as between private parties in the courts of the United States." When presented with an RCFC 59 motion, the court may open a judgment entered, take additional testimony, amend findings of fact and conclusions of law, and direct entry of a new judgment. *Id.*

Granting an RCFC 59 motion lies within the discretion of the court. *Yuba Natural Res., Inc. v. United States*, 904 F.2d 1577, 1583 (Fed. Cir. 1990); *Stockton E. Water Dist. v. United States*, 76 Fed. Cl.

497, 499 (2007). "Motions for reconsideration must be supported 'by a showing of extraordinary circumstances which justify relief.'" *Caldwell v. United States*, 391 F.3d 1226, 1235 (Fed. Cir. 2004) (quoting *Fru-Con Constr. Corp. v. United States*, 44 Fed. Cl. 298, 300 (1999), *aff'd*, 250 F.3d 762 (Fed. Cir. 2000) (unpubl. table)). Reviving unsuccessful arguments and/or making new arguments not previously presented is impermissible in a motion for reconsideration, as such a motion "'is not intended to give an unhappy litigant an additional chance to sway the court.'" *Stockton E. Water Dist.*, 76 Fed. Cl. at 500 (quoting *Bishop v. United States*, 26 Cl. Ct. 281, 286 (1992)); *see also White Mountain Apache Tribe v. United States*, 9 Cl. Ct. 32, 35 (1985) ("'The reargument of cases cannot be permitted upon the sole ground that one side or the other is dissatisfied with the conclusions reached by the court.'" (quoting *Roche v. Dist. of Columbia*, 18 Ct. Cl. 289, 290 (1883))).

2. *Park Terrace and Mullica's motion to amend*

Plaintiffs Park Terrace and Mullica ask the court to amend its judgment that jurisdiction is lacking to adjudicate their claims as to the "extended period." Park Terrace and Mullica argue that the court improperly dismissed their claims for the extended period because the court "failed to address" their "alternative theory," which sought "a remedy for the breach of the second contract [the incentive equity loans] which came into existence only after the putative demand and refusal to perform had accrued the rights to sue for the breach of the first [the Section 515 and Section 521 loans]." Pls.' Br. filed Mar. 14, 2008, at 4-6. Because the incentive equity loans are "separate and independent contract transaction[s]," *id.*

at 7, such contracts can be breached only after they come into existence. Consequently, according to moving plaintiffs, the court's determination to dismiss their "extended period" claims on a ruling that such claims accrued prior to the date on which the equity loan transactions took place is in error. During argument held on December 14, 2007, moving plaintiffs asked the court to consider this "alternative theory" and represented that "they have at all relevant junctures been willing to (and remain willing to) amend the Complaint" to conform their pleadings to the arguments. *Id.* at 3-4, 9 n.4. The "alternative theory" that Park Terrace and Mullica advance in their motion, however, amounts to a reformation of their complaint.

The "extended period" claims discussed throughout the court's opinions referred to "claims for the prepayment rights in the unexpired loan terms following the twenty-year userestriction periods agreed upon pursuant to [Park Terrace's and Mullica's] incentive loans." *Tamerlane*, 2008 WL 590876, at *4. The phrase "unexpired loan terms" referred to Park Terrace's and Mullica's original pre-1979 Section 515 and Section 521 loans that do not mature until 2028 and 2017, respectively. The "independent and separate" incentive equity loans entered into in 1993 and 1991, respectively, contained twenty-year use-restriction periods, which extended from 1993 to 2013 on Park Terrace's property and from 1991 to 2011 on Mullica's property. Thus, the opinion's references to Park Terrace's "extended period" claim referred to a claim for damages for breach of the pre-1979 loan contract for the period from the date that the incentive equity loan use-restriction period ended in 2013 until Park Terrace's pre-1979 loan matured in 2028. The

opinion's references to Mullica's "extended period" claim referred to the claim for damages for breach of the pre-1979 loan contract for the period from the date that the incentive equity loan use-restriction period ended in 2011 until Mullica's pre-1979 loan matured in 2017. While the opinion's usage of the "primary period" and "extended period" terminology delineated potential "periods" of claims insofar as plaintiffs sought to recover damages for a breach that extended through these periods, the opinion ruled on only moving plaintiffs' claims under their pre-1979 loan contracts, as affected by the passage of the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815 (1988) ("ELIHPA"), and the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672, 3681, 3841 (codified in relevant part at 42 U.S.C. § 1472(c)(2000)).

The court's May 18, 2007 opinion and February 29, 2008 supplemental opinion adjudicated Park Terrace's and Mullica's breach of contract claims regarding their pre-1979 loan contracts – those contract breach claims pleaded in their June 22, 2005 complaint. Dismissal of Park Terrace's and Mullica's claims for the "extended period," as the court termed it, does not, as responding plaintiffs contend, "deprive[] Moving Plaintiffs of a remedy for the breach of the second contract [the incentive equity loans] which came into existence only *after* the putative demand and refusal to perform had accrued the rights to sue for the breach of the first [the pre-1979 loans]." Pl.'s Br. filed Mar. 14, 2008, at 6.[1]

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[1] While some of moving plaintiffs' remarks and briefs have alluded to seeking damages with respect to an "extended period" that would run until their incentive equity loans mature in 2043 and

3. *Park Terrace and Mullica's alternative theory*

Defendant opposes the motion to amend judgment, arguing that the alternative theory advanced "concerns a claim that was not pleaded, and could not have been pleaded because it makes no sense: a claim that the enactment of ELIHPA constituted an anticipatory breach of contracts (the equity loan agreements) that did not yet exist." Def.'s Br. filed Mar. 24, 2008, at 2-3.

Park Terrace and Mullica's motion appears to advance claims for breach of the incentive equity loan contracts and declares that the court committed an error in dismissing those claims because the incentive equity loan contracts did not exist until after the dates

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2036, *see, e.g.*, Pls.' Br. filed Dec. 18, 2006, at 19-20, moving plaintiffs' June 22, 2005 complaint is not reasonably susceptible of amendment to assert breach of contract claims with respect to the incentive equity loans, as such claims would appear to state separate and independent causes of action. Before final judgment entered on their claims, the court did not grant moving plaintiffs leave to amend the complaint to assert independent claims with regard to the incentive equity loans, and the court's opinions adjudicated only plaintiffs' claims based on their pre-1979 contracts.

While conceding that the creation of the equity loans gave rise to new contracts, defendant maintains that "[t]his does not mean, however, that the creation of the equity loan contracts gave rise to a new cause of action." Def.'s Br. filed Mar. 24, 2008, at 5 & n.1. Defendant, nevertheless, states that "Park Terrace and Mullica remain free to file a suit alleging that, after the equity loans became effective, the Government engaged in conduct distinct from the enactment and implementation of ELIHPA that constituted a repudiation or breach of the equity loan contracts." *Id.* at 6.

that the court deemed claim accrual had occurred.[2] Moving plaintiffs state: "It is axiomatic that a contract may be breached only after the contract has come into existence." Pls.' Br. filed Mar. 14, 2008, at 6. However, moving plaintiffs undermine the logic of their alternative theory in the same paragraph: "Likewise, an anticipatory breach occurs *once a contract is in existence*, when the promisor upon demand refuses to perform." *Id.* (emphasis added). As Park Terrace and Mullica's alternative theory appears to allege that ELIHPA, enacted in 1988, anticipatorily breached or repudiated contracts created in 1991 and 1993, the court, just as defendant, is perplexed by whether a viable cause of action can be maintained on this alternative theory. *See* Def.'s Br. filed Mar. 24, 2008, at 5 ("[T]he very fact that, as plaintiffs emphasize, the equity loan contracts did not exist until after ELIHPA was enacted means that any new cause of action that might possibly arise for breach [of] these contracts could not be based upon a claim that ELIHPA constituted an anticipatory breach."). The proper vehicle for airing this theory is not a motion for reconsideration.

4. *Errata to the May 18, 2007 opinion and February 29, 2008 supplemental opinion*

Moving plaintiffs have brought to the court's attention an error in the May 18, 2007 opinion. The May 18, 2007 opinion stated: "The statute of limitations began to run for Park Terrace as to the

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[2] As stated in *supra* note 1, the court's opinions do not purport to dismiss any claims asserting breach of incentive equity loan contracts, as the complaint did not plead those claims.

twenty-year restriction period on or before *July 16, 1992*, when Park Terrace entered into its equity loan with FmHA." *Tamerlane, Ltd.*, 76 Fed. Cl. at 523 (emphasis added). As that opinion stated earlier, Park Terrace entered into an equity loan with FmHA on July 16, 1993. *See id.* at 516 ("On *July 16, 1993*, Park Terrace borrowed an additional $ 925,000." (emphasis added)). Regrettably, this error was carried forward uncorrected into the supplemental opinion issued on February 29, 2008, thereby requiring further correction.[3] The error as to the date does not affect the substance of the court's rulings in these opinions; Park Terrace's breach of contract claim accrued by, and the statute of limitations began to run on, July 16, 1993, and the June 22, 2005 complaint was filed well beyond the six year statute of limitations.

CONCLUSION

Park Terrace and Mullica have not justified their motion to amend judgment. Accordingly, based on the foregoing, Park Terrace and Mullica's motion to amend judgment is denied, except insofar as corrections have been made to both the May 18, 2007 opinion and the February 29, 2008 supplemental opinion.[4]

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[3] The following pages of the supplemental opinion entered on February 29, 2008, required correction: pages 7 (two errors corrected), 15, 16 (two errors corrected), 18, 19, 21 (two errors corrected, including removal of footnote 10). Footnote 10, which relied in substance on the incorrect date of July 16, 1992, is deleted in its entirety.

[4] The May 18, 2007 opinion and the February 29, 2008 supplemental opinion have been corrected on the commercial electronic databases, the listing of published opinions on the

IT IS SO ORDERED.

s/ Christine O.C. Miller

Christine Odell Cook Miller
Judge

United States Court of Federal Claims's web site; and the cases docket entries [31] and [73], respectively, to reflect the correct date of July 16, 1993.

APPENDIX C

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 05-677C

[Filed February 29, 2008]

TAMERLANE, LIMITED, PARK TERRACE LIMITED, PARK TERRACE EAST LIMITED, and MULLICA WEST LIMITED, Plaintiffs,	)
v.	)
THE UNITED STATES, Defendant.	)

JUDGES: Christine Odell Cook Miller, Judge.

SUPPLEMENTAL OPINION AND ORDER ON MOTION FOR JUDGMENT ON PLEADINGS TO DISMISS FOR LACK OF JURISDICTION AND PLENARY OPINION ON MOTION TO DISMISS ON MERITS

MILLER, Judge.

Issues involving the timeliness of the complaint in this case have been bandied about for over two years.

Although plaintiffs were not invited to join the omnibus settlement of several hundred cases for which liability had been determined, *see Franconia Assocs. v. United States*, 536 U.S. 129 (2002) (holding that enactment of Emergency Low Income Housing Preservation Act of 1987 was repudiation of loan agreements rather than present breach and that claims therefore accrue upon election by borrowers or upon tender and rejection of prepayment), the case has been the subject of two protracted stays for settlement.

Pending before the court after argument are defendant's supplemental briefs in support of dismissal of the takings claims set forth in Count II of plaintiffs' complaint for failure to state a claim upon which relief can be granted. During supplemental briefing, both parties also availed themselves of the opportunity to reargue the jurisdictional statute of limitations issue raised in defendant's first dispositive motion filed on November 16, 2006, and addressed in the court's May 18, 2007 opinion, *Tamerlane, Ltd. v. United States*, 76 Fed. Cl. 512 (2007) (the "May 18, 2007 opinion"), but not finally determined by the court. *See* RCFC 54(b) (providing that decision addressing fewer than all claims and/or parties in action "shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties," absent express statement directing entry of judgment). As no final judgment has entered as to any claims or parties, the court now considers all arguments related to the statute of limitations on the contract claims of plaintiffs Park Terrace Limited and Mullica West Limited, in addition to those arguments presented in the parties'

supplemental briefs regarding the motion to dismiss Count II, which affects all four plaintiffs.[1]

BACKGROUND

A detailed recitation of the procedural history of this case is set forth in light of the complicated arguments (and re-argument) affecting all four plaintiffs, each presenting unique factual contexts. Familiarity with the background and facts described in the May 18, 2007 opinion is presumed; discussion of facts relevant to the pending issues follows.[2]

On June 22, 2005, plaintiffs Park Terrace Limited ("Park Terrace"), Park Terrace East Limited ("Park Terrace East"), Mullica West Limited ("Mullica"), and Tamerlane, Limited ("Tamerlane") (collectively, "plaintiffs") filed a complaint asserting breach of contract and takings claims. The complaint recites that all four plaintiffs entered into loan contracts with the Government through the Farmers Home Administration ("FmHA") to provide low- to moderate-income housing. These loans were entered into pursuant to sections 515 and 521 of the Housing Act of

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[1] Accordingly, Park Terrace Limited and Mullica West Limited's June 6, 2007 motion to strike, in part, defendant's supplemental brief for improper re-argument of issues decided by the May 18, 2007 opinion is denied.

[2] In addition to the facts found in *Tamerlane*, 76 Fed. Cl. at 512-24, which are incorporated by reference, the facts set forth in this section and any included in the discussion section represent the court's findings with respect to all facts. *See Monsanto Co. v. Bayer Bioscience N.V.*, 514 F.3d 1229, 2008 WL 200027, at *7 n.13 (Fed. Cir. 2008) (questioning whether factual findings must be restated in trial court opinion's legal discussion).

1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended at 42 U.S.C. §§ 1485, 1490a (2000)) ("Section 515 loan" and "Section 521 loan"), which obligated borrowers to operate the properties according to FmHA regulations in exchange for favorable loan terms. The loans at issue consist of those entered into prior to December 21, 1979 ("pre-1979 loans"), which contained contractual provisions allowing borrower termination by prepayment at any time, and loans entered into after December 21, 1979 ("post-1979 loans"), which allow prepayment at any time, but restrict the property to use as low-income housing for a minimum period of twenty years from the date of loan origination.

Plaintiffs' complaint alleges that enactment and implementation of the Emergency Low Income Housing Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1815, 1877 (1988) (amending section 502(c) of the Housing Act of 1949) ("ELIHPA"), and the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672, 3681, 3841 (codified in relevant part at 42 U.S.C. § 1472(c) (2000)),[3] constituted an anticipatory repudiation of plaintiffs' contractual prepayment rights and a taking of plaintiffs' property.[4] *Id.* ¶¶ 39, 40, 50, 53. Together

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[3] A detailed recitation of the enactment and legislative history of these statutes can be found in *Franconia*, 536 U.S. at 135-37, and in the May 18, 2007 opinion, *Tamerlane*, 76 Fed. Cl. at 514-15.

[4] [B]y requiring the plaintiffs to house low-income tenants and to accept new low-income tenants, the Government has (i) conscripted plaintiffs' properties for public use; (ii) physically invaded or authorized others to physically invade plaintiffs' properties; and (iii) deprived plaintiffs of

these statutes undertook to forestall the borrowers' exercise of their prepayment rights on Section 515 and Section 521 loans and prevent removal of the properties from the low-income housing program. ELIHPA provides that, before FmHA can accept the prepayment of a Section 515 loan, FmHA

> shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed.

42 U.S.C. § 1472(c)(4)(A); *see also Franconia*, 536 U.S. at 136. ELIHPA provides incentives for borrowers that agree to extend the low-income use of their housing including, *inter alia*: (1) reduction in the interest rate on the loan; (2) increase in the rate of return; and (3) additional loans to the borrower. 42 U.S.C. § 1472(c)(4)(B). With certain limited exceptions, if FmHA and the borrower cannot reach an agreement "after a reasonable period[,] . . . [FmHA] shall require the borrower . . . to offer to sell the assisted housing and related facilities involved to any qualified nonprofit organization or public agency at a fair market value." 42 U.S.C. § 1472(c)(5)(A)(i).

> their distinct investment-backed expectations with regard to their properties, all without providing any just compensation.

Compl. filed June 22, 2005, ¶ 40.

Plaintiffs' complaint represents that Tamerlane entered into a post-1979 loan contract for rental housing with FmHA and made a "formal request to prepay . . . in December 2000, after the twenty-year use restriction period expired. Thereafter, in the face of actual or constructive denial of the request to prepay, Tamerlane accepted 'incentives' in the form of government approval to get 41 million in conventional financing . . . ." Compl. filed June 22, 2005, ¶ 11.1.

Park Terrace East entered into a post-1979 loan contract with FmHA as to which the twenty-year restriction on prepayment expired in 2000. *Id.* ¶ 11.3. The record does not contain any showing that Park Terrace East sought to prepay, accepted incentives, or obligated itself to any additional use-restriction period.

Park Terrace entered into pre-1979 unrestricted fifty-year loan contracts for rental housing with FmHA and, in or about 1992, upon being informed that "FmHA would never approve prepayment," accepted "incentives" and obligated itself to a twenty-year use-restriction period to keep the property within the program. *Id.* ¶ 11.2.

Mullica entered into pre-1979 unrestricted loan contracts and, in 1991, upon being informed that "FmHA would never approve the prepayment," accepted "incentives" and obligated itself to a twenty-year use-restriction period to keep the property within the program. *Id.* ¶ 11.4.

Defendant's answer, filed on September 21, 2005, asserted that the contract claims of Park Terrace and Mullica (also, "responding plaintiffs") are time-barred by the applicable statute of limitations and that the

contract claims of Park Terrace, Tamerlane, and Mullica are subject to the defense of accord and satisfaction. Defendant also argued that all four plaintiffs' takings claims in Count II fail to state a claim upon which relief can be granted.

On November 9, 2005, the parties filed a Joint Preliminary Status Report wherein plaintiffs sought commencement of settlement negotiations on all issues, and defendant stated that, prior to entering settlement negotiations, it expected to file a dispositive motion regarding the statute of limitations, plaintiffs' Count II takings claims, and its defense of accord and satisfaction. By order entered on November 17, 2005, the parties were directed to file a Joint Status Report by January 31, 2006, proposing a schedule for the filing of dispositive motions or seeking a stay pending settlement discussions.

On December 28, 2005, the parties filed a Joint Motion To Stay Proceedings pending settlement negotiations, which was granted on January 3, 2006. On March 15, 2006, the parties filed a Joint Status Report seeking to continue the stay of proceedings and indicating that, although not a part of the omnibus settlement proceedings before another judge of the court, a pattern or template for settlement may emerge from those discussions that would prove helpful to the settlement of plaintiffs' claims.

The parties submitted a Joint Status Report on August 17, 2006, detailing problems with the advancement of settlement discussions. Plaintiffs requested that the court refer the case to the omnibus judge. Defendant acquiesced in this request as to damages calculations, but requested that the

jurisdictional statute of limitations issue affecting Park Terrace and Mullica preliminarily be resolved by motion. Defendant intended to file such a motion on or before September 25, 2006. Plaintiffs expressed that any delay in referring the case to the omnibus judge would serve no useful purpose, as they anticipated that the statute of limitations defense would turn on disputed issues of fact that could not be resolved on motion, but would be suitable for discussion in ADR proceedings. Alternatively, plaintiffs requested that the court establish a pre-trial schedule for the entire case.

On October 10, 2006, defendant filed a motion to the lift the stay for the limited purpose of allowing the filing of a dispositive motion. Defendant advised that "the motion would seek dismissal of the claims of plaintiffs Park Terrace Limited and Mullica West Limited based upon the statute of limitations." Def.'s Mot. filed Oct. 10, 2006, at 2. Defendant noted that "[t]he motion would also seek dismissal of Count Two of the complaint (alleging [a] taking of property without just compensation) as to all plaintiffs, for failure to state a claim upon which relief can be granted." *Id.* In their October 26, 2006 response, plaintiffs opposed defendant's motion to lift the stay on this limited issue as "unfair" and requested that the court either submit the entire case to the omnibus proceeding or lift the stay fully to allow discovery to proceed under a case management order, thereby avoiding "fragmentation" and "duplicative" efforts. Pls.' Br. filed Oct. 26, 2006, at 2. In its reply filed on November 9, 2006, defendant eluded the charge of "unfairness" by pointing out that plaintiffs are free to request a full lifting of the stay to file their own dispositive motions. Defendant also rejoined that

fragmentation and duplication could be avoided by severing plaintiffs' claims, as it considered that the four plaintiffs had been joined improperly. Defendant reiterated its intention to file a dispositive motion and demurred regarding settlement, representing that it would not be a willing party to settlement negotiations. *See* Def.'s Br. filed Nov. 9, 2006, at 2 ("[U]nder the rules of this Court, 'ADR is voluntary. A party's good-faith determination that ADR is not appropriate in a particular case should be respected by other parties and by the court.'" (quoting RCFC Appendix H, ¶ 3(a))). An order entered on November 15, 2006, stating that "[a]fter review of the briefs, the court deems that the jurisdictional issues only should be addressed." Order entered Nov. 15, 2006. The court further ordered that "[t]he stay in this matter is lifted for all purposes, and defendant shall file its dispositive motion by November 30, 2006." *Id.*

On November 16, 2006, defendant filed Defendant's Motion for Judgment on the Pleadings[] Dismissing the Claims of Park Terrace Limited and Mullica West Limited, arguing that both Park Terrace's and Mullica's claims accrued upon their requests to prepay their loans in 1992 and 1991, respectively, beyond the six-year statute of limitations for filing suit.[5] On

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[5] In a footnote, defendant observed:

> In our Motion to Lift Stay for Purpose of Allowing Filing and Adjudication of Dispositive Motion, we stated that we would also seek dismissal of Count Two of the complaint (alleging a taking of property without just compensation) as to all plaintiffs, for failure to state a claim upon which relief can be granted. In its November 15, 2006 Order, the Court lifted the stay for all purposes,

December 18, 2006, plaintiffs Park Terrace and Mullica opposed defendant's motion, arguing both that the requests to prepay were merely "pro forma," and thus accrual did not occur as to plaintiffs' contract breach claims (the "primary-period" claims) and, alternatively, that Park Terrace and Mullica could maintain a suit for "unvested" claims for the prepayment rights in the unexpired loan terms following the twenty-year use restriction periods agreed upon pursuant to their incentive loans (the "extended-period" claims). Defendant's January 3, 2007 reply rebuked Park Terrace and Mullica for characterizing the requests to prepay as merely pro forma and arguing that claims with respect to unexpired loan periods exist, as belied by plaintiffs' own complaint. During argument held on January 25, 2007, the parties requested that the court delay issuance of an opinion on defendant's dispositive motion so that the parties could explore further settlement discussions. *See* Order entered Apr. 25, 2007. However, by April 25, 2007, the parties had informed the court that settlement discussions had not proved fruitful and requested the court to issue its opinion as soon as possible. *Id.*

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but also stated that the Court "deem[ed] that the jurisdictional issues only should be addressed." For this reason, the present motion is limited to the statute of limitations issue, which is jurisdictional. We reserve the right to file a separate dispositive motion concerning the merits of Count Two, and any other non-jurisdictional issues, at a later time.

Def.'s Br. filed Nov. 16, 2006, at 1 n.1.

The court issued its order and opinion on defendant's dispositive motion on May 18, 2007. *Tamerlane*, 76 Fed. Cl. 512. The court elected to treat defendant's motion for judgment on the pleadings as one for summary judgment, because matters outside of the pleadings were presented by defendant and not excluded by the court. *See* RCFC 12(c). The court determined that Park Terrace's and Mullica's prepayment requests were denied finally and unequivocally and were not merely "pro forma" and that FmHA's actions in not honoring those requests thus constituted a breach and accrual for statute of limitations purposes. The statute of limitations effected a jurisdictional bar to Park Terrace's and Mullica's primary-period claims that had accrued in 1992 and 1991, respectively. Confronting Park Terrace and Mullica's alternative argument for the extended-period claims, the court ruled that an anticipatory repudiation and breach claim still would stand unaccrued as to any "unvested" prepayment rights. *See id.* at 523. As the documents detailing the contractual dealings between responding plaintiffs and the Government were not in the record, the court directed the parties to file copies of the transactional documents with the Clerk of the Court. The parties were further directed to submit supplemental briefs on defendant's alternative ground for dismissal for failure to state a claim upon which relief can be granted. *Id.* (citing Def.'s Br. filed Nov. 16, 2006, at 1 n.1 (reserving right to seek dismissal of plaintiffs' Count II takings claims for failure to state claim upon which relief can be granted)).

On June 5, 2007, defendant filed its supplemental brief in support of dismissal for failure to state a claim upon which relief can be granted. Defendant submitted

that the court had "analyzed, but did not expressly decide, whether the claims of plaintiffs [Park Terrace] and [Mullica] were barred by the statute of limitations." Def.'s Br. filed June 5, 2007, at 1. Defendant disputed the existence of any viable claims that could be maintained beyond the accrual of the breaches, which the court determined to have occurred in 1992 and 1991. Regarding all four plaintiffs' Count II takings claims, defendant urged that, because plaintiffs' rights to prepay arise solely out of their contracts with the Government, their complaint fails to state takings claims upon which relief can be granted.

On June 6, 2007, Park Terrace and Mullica filed a motion to strike a portion of defendant's supplemental brief filed June 5, 2007, asserting that defendant's brief "improperly re-argues issues already decided and which were not permitted to be briefed under the Order [dated May 18, 2007]." Pls.' Br. filed June 6, 2007, at 2. Responding plaintiffs maintained that the court's order restricted supplemental briefing to defendant's motion to dismiss for failure to state a claim as to plaintiffs' Count II takings claims and requested that the court redress defendant's attempt to reargue whether claims with respect to the extended period exist by striking defendant's brief as it pertains to issues other than plaintiffs' takings claims. On June 7, 2007, by order, the court committed to address the issue raised by responding plaintiffs in its supplemental opinion. This motion is denied. RCFC 54(b) contemplates that such rulings are interim and can be revised. Moreover, responding plaintiffs availed themselves of the opportunity in this round of supplemental briefs to resuscitate the timeliness of their primary-period claims.

Park Terrace and Mullica, on June 15, 2007, submitted their supplemental brief responding to defendant's putatively improper re-argument and requesting that the court "reexamine its position concerning that portion of the Order to the extent it decided the issue unfavorably to Responding Plaintiffs." Pls.' Br. filed June 15, 2007, at 1 & n.2. Park Terrace and Mullica reiterated a plea for discovery if the court were inclined to consider matters beyond the pleadings in making its ruling. Park Terrace and Mullica advanced that discovery could vindicate their position on the jurisdictional bar to their primary-period claims by confirming that the prepayment requests merely were formalistic. The brief also argued that takings claims could be maintained concurrently with plaintiffs' contract claims.

The court requested on June 15, 2007, a response from defendant regarding Park Terrace and Mullica's request for discovery in aid of opposing summary judgment. *See* Order entered June 15, 2007. On June 20, 2007, defendant opposed any discovery, chiding responding plaintiffs for delaying until their supplemental brief any request for discovery on the jurisdictional issue. On June 25, 2007, the court ordered limited discovery, to be completed by August 20, 2007.

On August 15, 2007, the parties filed a Joint Status Report. Park Terrace and Mullica contended that documents produced in discovery supported their arguments – rejected by the May 18, 2007 opinion – that the statute of limitations did not begin to run on their primary-period claims until the lawsuit was filed. Responding plaintiffs requested that the court set a

further briefing schedule on the jurisdictional issue. On October 23, 2007, after a status conference covering all parties, an order entered setting a supplemental briefing schedule on both the jurisdictional issue and the motion to dismiss Count II, as well as a date for argument.[6]

On November 15, 2007, in accordance with the briefing schedule set in the October 24, 2007 order, Park Terrace and Mullica filed their supplemental jurisdictional brief responding to defendant's first dispositive motion on the statute of limitations issue, addressed in the May 18, 2007 opinion; this brief also responded on behalf of all four plaintiffs to defendant's motion to dismiss plaintiffs' Count II takings claims. On December 6, 2007, defendant filed its supplemental responsive brief, addressing all of Park Terrace and Mullica's arguments regarding accrual of their primary-period claims, alternative claims as to the extended period, and the takings claims of all four plaintiffs. The argument held on December 14, 2007, was open to all issues that counsel wanted to discuss.

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[6] As to Tamerlane and Park Terrace East, the plaintiffs not affected by defendant's jurisdictional dispositive motion, the court ordered defendant (after agreement by counsel at the status conference) to make available the methodology employed in the omnibus settlement. Tamerlane and Park Terrace East were ordered to notify the court by November 30, 2007, whether the cases would proceed to settlement or, alternatively, whether Tamerlane and Park Terrace East would file a motion for partial summary judgment on liability. The order also set a briefing schedule in the event that plaintiffs filed a motion for partial summary judgment. Cross-motions for summary judgment on the issue of liability pertaining to plaintiffs Tamerlane and Park Terrace East currently are pending and will be resolved by a separate opinion.

DISCUSSION

The parties have availed themselves of the opportunity to re-address arguments that the court ruled on in the May 18, 2007 opinion. *See Tamerlane*, 76 Fed. Cl. at 519-24 (making initial findings as to primary-period claims but reserving entry of final decision until a development of fuller record). The May 18, 2007 opinion did not direct entry of final judgment as to any of the claims pending or parties before the court. *See* RCFC 54(b). With the benefit of a full record documenting the contractual dealings of the parties, see id. at 515 n.3 & 524 (ordering parties to file transactional documents with Clerk of Court), along with the arguments that the parties have raised in their initial and supplemental briefs, the court considers in this opinion whether the incentive-loan transactions impacted claim accrual and the running of the statute of limitations. The court arrives at the same conclusion reached in the May 18, 2007 opinion with respect to the primary-period claims. However, defendant has persuaded the court that the result should apply equally to the extended-period claims, as the incentive-loan transactions have only limited bearing on the accrual of responding plaintiffs' primary-period claims and do not create or result in claims as to "unvested" rights.[7]

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[7] Defendant succinctly stated the relevance of the incentive-loan transactions on responding plaintiffs' claims in one of its post-May 18, 2007 briefs:

> This is not to say that the equity loans are entirely irrelevant. The significance of the equity loans is this: The Government's offer of equity loans was an acknowledgment of receipt of plaintiffs' prepayment

I. *Standard of review*

1. *Motion for judgment on pleadings*

Defendant's November 16, 2006 dispositive motion seeks judgment on the pleadings in its favor pursuant to RCFC 12(c). RCFC 12(c) provides: "After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." Matters outside the pleadings are presented by defendant. Thus, because "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in RCFC 56, and all parties shall be given reasonable opportunity to present all material made pertinent." RCFC 12(c); *see also Colvin Cattle Co. v. United States*, 468 F.3d 803, 806 (Fed. Cir. 2006); *Brubaker Amusement Co. v. United States*, 304 F.3d 1349, 1355-56 (Fed. Cir. 2002). Discovery on the matters under

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requests and an indication that the Government was not allowing plaintiffs to prepay. Plaintiffs' acceptance of equity loans was an indication that their prepayment requests were neither withdrawn prior to denial nor intended as mere tentative inquiries. The restrictive use provisions of the equity loans preclude plaintiffs from arguing that they were still awaiting acceptance of their prepayment requests after receiving the equity loans, since prepayment would only terminate the restrictions under their Section 515 loans, not the independent restrictions under their equity loans. Nothing about the equity loans, however, made the denial of plaintiffs' prepayment requests any more limited than if there had been no equity loans at all.

Def.'s Br. filed Dec. 6, 2007, at 11 n.3.

consideration by this court concluded on August 20, 2007, and the parties have presented all material pertinent to the pending motion.

Under Rule 56(c) "[s]ummary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Brubaker Amusement Co.*, 304 F.3d at 1356 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). No genuine issue of material fact exists when a rational trier of fact could only arrive at one reasonable conclusion. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986); *Hall v. Aqua Queen Mfg., Inc.*, 93 F.3d 1548, 1553 n.3 (Fed. Cir. 1996). In such cases the need for a trial is not present, and the motion for summary judgment must be granted. Summary judgment, however, will not be granted if "the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Eli Lilly & Co. v. Barr Labs.*, 251 F.3d 955, 971 (Fed. Cir. 2001); *GE v. Nintendo Co.*, 179 F.3d 1350, 1353 (Fed. Cir. 1999).

If the nonmoving party produces sufficient evidence to raise a question as to the outcome of the case, the motion for summary judgment should be denied. "The moving party in a summary judgment motion has the burden to show 'that there is an absence of evidence to support the non-moving party's case[.]'" *Crown Operations Int'l v. Solutia Inc.*, 289 F.3d 1367, 1377 (Fed. Cir. 2002) (quoting *Celotex Corp.*, 477 U.S. at 322-23). The benefit of all reasonable presumptions and inferences runs to the party opposing summary

judgment. *Matsushita Elec. Indus.*, 475 U.S. at 587-88; *Monon Corp. v. Stoughton Trailers, Inc.*, 239 F.3d 1253, 1257 (Fed. Cir. 2001); *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984) (noting that non-moving party shall "receive the benefit of all applicable presumptions, inferences, and intendments").

2. *Motion to dismiss for failure to state a claim*

Defendant seeks dismissal of all four plaintiffs' Count II takings claims for failure to state a claim upon which relief can be granted. The court's task is not to determine whether a plaintiff will ultimately prevail, but "'whether the claimant is entitled to offer evidence to support the claims.'" *Chapman Law Firm Co. v. Greenleaf Constr. Co.*, 490 F.3d 934, 938 (Fed. Cir. 2007) (quoting *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974)). In *Bell Atlantic Corp. v. Twombly*, __U.S. __, 127 S. Ct. 1955 (2007), the United States Supreme Court clarified the standard enunciated in *Conley v. Gibson*, 355 U.S. 41 (1957), with respect to what a plaintiff must plead to survive a motion to dismiss for failure to state a claim.[8] The Supreme Court circumscribed the standard, stating: "'[A]ny statement

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[8] The *Conley* standard, abrogated by *Bell Atlantic*, stated "that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley*, 355 U.S. at 45-46. *Bell Atlantic* retired the literal interpretation of *Conley's* "no set of facts" language "as an incomplete, negative gloss on an accepted pleading standard: once a claim has been stated adequately, it may be supported by showing any set of facts consistent with the allegations in the complaint." *Bell Atl. Corp.*, 127 S. Ct. at 1969.

revealing the theory of the claim will suffice unless its factual impossibility may be shown from the face of the pleadings.'" *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 n.4 (Fed. Cir. 2007) (quoting *Bell Atl. Corp.*, 127 S. Ct. at 1968). Accordingly, the court must assess whether plaintiffs adequately have stated a takings claim and whether plaintiffs can allege any facts that, if proven, would entitle them to the relief sought. See *Bell Atl. Corp.*, 127 S. Ct. at 1968-69; *McZeal*, 501 F.3d at 1361-62. Although plaintiffs' factual allegations need not be "detailed," they "must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp.*, 127 S. Ct. at 1964-65 (internal citation omitted). The court thus "'accept[s] as true all factual allegations in the complaint, and . . . indulge[s] all reasonable inferences in favor of the non-movant,'" to evaluate whether plaintiffs have stated a takings claim upon which relief can be granted. *Chapman Law Firm*, 490 F.3d at 938 (omission in original) (quoting *Sommers Oil Co. v. United States*, 241 F.3d 1375, 1378 (Fed. Cir. 2001)).

3. *Statute of limitations as a jurisdictional requirement*

Prior to the Supreme Court's recent confirmation in *John R. Sand & Gravel v. United States*, ___U.S. ___, 128 S. Ct. 750 (2008), some decisions of the United States Court of Appeals for the Federal Circuit and Court of Federal Claims questioned the nature of a motion to dismiss a complaint as time-barred in holding that claims falling outside of the six-year statute of limitations prescribed in 28 U.S.C. § 2501 (2000), should be dismissed for failure to state a claim rather than for lack of subject matter jurisdiction. *See*,

e.g., Venture Coal Sales Co. v. United States, 370 F.3d 1102, 1105 n.2 (Fed. Cir. 2004) ("The most precise ground for the trial court's decision here . . . would seem to be that [plaintiff] failed to make its claim within the required limitations period–that is not a question of subject matter jurisdiction of the court."); *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) ("As a threshold matter, this statutory language confirms that the question of a time bar on [plaintiff's] claim does not affect the subject matter jurisdiction of the Court of Federal Claims. The Court of Federal Claims has subject matter jurisdiction to adjudicate cases arising under the Tucker Act regardless of the timeliness of [plaintiff's] actions. [Plaintiff's] untimeliness can, however, bar its eligibility to invoke that jurisdiction."). It is now not subject to question that filing a claim within the six-year statute of limitations prescribed in 28 U.S.C. § 2501 is a prerequisite to the court's exercise of jurisdiction over a claim. *John R. Sand & Gravel*, 128 S.Ct. at 757 (reaffirming prior precedent under principles of *stare decisis* that Tucker Act's statute of limitations is "jurisdictional"). *See generally Tamerlane*, 76 Fed. Cl. at 518-19 (discussing statute of limitations as jurisdictional requirement).

II. *Park Terrace and Mullica's primary-period claims*[9]

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[9] While not argued in any of Park Terrace or Mullica's post-May 18, 2007 supplemental briefs, nor their earlier briefs in response to defendant's dispositive motion, responding plaintiffs, at the December 14, 2007 oral argument, implored the court to address whether the Government's response to Park Terrace's prepayment application constituted a "final denial." *See* Transcript of Proceedings, *Tamerlane, Ltd. v. United States*, No. 05-677C, at 22-

The May 18, 2007 opinion determined that Park Terrace's and Mullica's claims for breach of contract pursuant to the anticipatory repudiation effected by ELIHPA were barred by the six-year statute of limitations. *See Tamerlane*, 76 Fed. Cl. at 523. Park Terrace and Mullica now ask the court to revisit these findings in light of evidence disclosed in discovery that, they contend, proves that both parties treated the prepayment applications as a "charade." Pls.' Br. filed Nov. 15, 2007, at 5. Park Terrace and Mullica assert that the incentive program initiated pursuant to ELIHPA was aimed at "incentivizing the borrower not to insist on prepayment," "getting the borrower to accept an equity loan in lieu of prepayment," and "avert[ing] prepayment." *Id.* at 6 (emphases omitted) (internal quotation marks omitted). This deflection of prepayment rights does not correlate to "*Franconia's* requirement of a meaningful tender of performance

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23 (Fed. Cl. Dec. 14, 2007). The May 18, 2007 opinion discussed in detail the Government's denial of Mullica's prepayment application in addressing responding plaintiffs' assertion that no final and unequivocal denial occurred as to Mullica. *See Tamerlane*, 76 Fed. Cl. at 519-21. Responding plaintiffs mirror their earlier arguments raised as to Mullica in arguing that Park Terrace never received a final denial from FmHA on its prepayment application. *See* Letter from Jack E. Kauffman, Assistant District Director of FmHA to Andrea McMurtie, Bala Realty (June 23, 1991) (App. to Def.'s Mot. for J. on Pleadings, filed Nov. 16, 2006, at 3) ("In conjunction with your prepayment request, we are making you, as General Partner for Park Terrace Limited, a one-time offer of an equity loan . . . ."). As more fully explained in the following discussion, *see infra* at p.17, that the conditioning of Park Terrace's absolute prepayment right came by way of an offer of incentives, rather than an outright and complete rejection of prepayment, is immaterial to the determination of when the breach accrued.

and dishonor, which is necessary to cause the Government's repudiation to ripen into an actual breach triggering accrual of the claim." *Id.* at 7. Essentially, Park Terrace and Mullica reargue that their breach of contract claims did not accrue until the filing of this lawsuit, because their submission of prepayment applications was merely "pro forma" and did not constitute a meaningful tender; furthermore they characterize the Government's offer of incentives in lieu of prepayment as a "foreordained" "avoidance measure" that did not constitute a meaningful dishonor and failure to perform. *Id.* at 5, 6 (emphasis omitted).

Park Terrace and Mullica ignore the court's caveat in its May 18, 2007 opinion: "That plaintiffs now claim that the letters were not intended as prepayment requests is immaterial." *Tamerlane*, 76 Fed. Cl. at 522. It is likewise immaterial that both responding plaintiffs and the Government considered the prepayment applications as a "charade" designed merely to facilitate the incentive-loan transactions. An examination of the Supreme Court's *Franconia* decision illuminates why this is so.

Franconia construed the right that borrowers possessed as an "absolute prepayment right" guaranteed by the loan contracts. *Franconia*, 536 U.S. at 133; *see also id.* at 141 ("[P]etitioners obtained precisely the promise they allege – a promise that permits them an *unfettered right to prepay* their mortgages any time over the life of the loans, thereby gaining release from federal restrictions on the use of their property." (emphasis added)). The Supreme Court ruled that whether petitioner's claims were filed within the six-year statute of limitations was a

function of "when the Government breached the prepayment undertaking stated in the promissory notes," because a cause of action for breach of contract accrues, and accordingly the statute of limitations begins to run, at the time of the breach. *Id.* at 141. The Court characterized the Government's performance duty as one "to accept prepayment and execute the appropriate releases," *id.* at 142, reasoning that "[f]ailure by the promisor [the Government] to perform at the time indicated for performance in the contract establishes an immediate breach." *Id.* at 142-43. The Supreme Court concluded that ELIHPA more properly is characterized as a "renunciation of a contractual duty *before* the time fixed in the contract for . . . performance," – a repudiation – because the time for the Government's performance had yet to arrive. *Id.* at 143 (internal quotation marks omitted) ("Viewed in this light, ELIHPA effected a repudiation of the FmHA loan contracts, not an immediate breach.").

The Supreme Court judged the impact of ELIHPA "[as conveying] an announcement by the Government that it would not perform as represented in the promissory notes if and when, at some point in the future petitioners attempted to prepay their mortgages;" as such, the statute constituted a repudiation rather than an immediate breach. Implicit in, and necessary to, this conclusion is the corresponding understanding that the provisions of ELIHPA constitute a repudiation of borrowers' unfettered and absolute rights to prepayment because the statute is a "'statement [by the Government] of intention not to perform except on conditions which go beyond the contract.'" *Id.* at 143 (quoting Restatement (Second) of Contracts § 250 cmt. b (1981)); *see also* 23 Richard A. Lord, *Williston on Contracts* § 63:47 (4th

ed. 2007) ("[A] party does commit an anticipatory breach by making an express demand for a performance to which he or she is not entitled, as by, for example, a statement that the party will not perform except on conditions that go beyond the contract, or on terms different from the original contract." (footnote omitted)). It is worth reminding that "'[a]n anticipatory repudiation occurs . . . when an obligor communicates to an obligee that he will commit a breach in the future." *Franconia*, 536 U.S. at 139 (quoting *Franconia v. United States*, 240 F.3d 1358, 1363 (Fed. Cir. 2001) (quoting *Kinsey v. United States*, 852 F.2d 556, 558 (Fed. Cir. 1988)), *rev'd*, 536 U.S. 129 (2002)). Thus, necessary to the Supreme Court's characterization of ELIHPA as a repudiation, is the following: the Government's actions pursuant to ELIHPA at some point in the future (including the procedures by which the Government offers incentive loans) will operate as a present and immediate breach.

Given the Supreme Court's carefully delineated assessment of ELIHPA's effect, responding plaintiffs argue inconsistently that ELIHPA repudiated their contractual prepayment rights, while the Government's implementation of the provisions of ELIHPA in 1992 and 1991 by offering Park Terrace and Mullica incentive loans is not a breach and accrual. As the Supreme Court explained,

> ELIHPA's implementing regulations establish a process by which the FmHA addresses prepayment requests. Under those procedures, the FmHA first "develo[ps] an incentive offer," making a "reasonable effort . . . to enter into an agreement with the borrower to maintain the housing for low-income use that takes into

> consideration the economic loss the borrower may suffer by foregoing *[sic]* prepayment." 7 C.F.R. § 1965.210 (2002).

Franconia, 536 U.S. at 137 (alterations in original).

Plaintiffs Park Terrace and Mullica have pleaded that, upon submission of prepayment letters to FmHA and notifications from FmHA that prepayment rights would not be honored, they accepted incentive loans pursuant to the provisions of ELIHPA, in exchange for agreeing to twenty-year use-restriction periods on their properties. *See* Compl. filed June 22, 2005, ¶¶ 11.2, 11.4. If ELIHPA's enactment served as an anticipatory repudiation of responding plaintiffs' unfettered and absolute rights to prepayment by conditioning the Government's performance upon the borrowers' agreement to additional restrictions and conditions, the Government's offer of incentives in exchange for agreement by borrowers to extend the restrictions on their properties constitutes precisely the breach and accrual that *Franconia* contemplated. As *Williston on Contracts* aptly notes, "An anticipatory breach can hardly be greater than an actual one." 23 Richard A. Lord, *Williston on Contracts* § 63:60 (4th ed. 2007).

Because FmHA responded to Park Terrace's and Mullica's requests to prepay by acting upon ELIHPA's mandate to offer incentives in the face of Park Terrace's and Mullica's absolute and unfettered rights to prepay, the Government dishonored its performance obligation to accept prepayment and thus committed a breach. As these actions were the dishonor that ELIHPA – as a repudiation – contemplated, Park Terrace's and Mullica's breach claims accrued at least

by 1992 and 1991 when FmHA and responding plaintiffs entered into incentive-loan transactions. "In these circumstances the statute of limitations began to run on Mullica's claims as to the twenty-year restrictions period on or before June 18, 1991, when Mullica entered into an equity loan with FmHA. The statute of limitations began to run for Park Terrace as to the twenty-year restriction period on or before July 16, 1992, when Park Terrace entered into its equity loan with FmHA." *Tamerlane*, 76 Fed. Cl. at 523. Consequently, Park Terrace's and Mullica's breach of contract claims as to the primary period are time-barred as filed beyond the applicable six-year statute of limitations.

III. *Park Terrace's and Mullica's alternative claims for the extended period*

The May 18, 2007 opinion contemplated that Park Terrace and Mullica may maintain claims for "unvested" prepayment rights for the extended period following the incentive-loan use-restriction periods, despite the bar to their primary-period claims. *Id.* at 523. Challenging this characterization of the prepayment rights as contrary to the holding of *Franconia*, defendant was allowed to reopen this issue in supplemental briefing. The court addresses all the parties' arguments.

Park Terrace and Mullica's contention that claims may be asserted for the extended period disputes defendant's characterization that the statute of limitations was triggered for all time. Park Terrace and Mullica thus assert: "[A]ssuming *arguendo* there was a meaningful demand and the claim accrued by virtue thereof, the bar of the statute should only

extend to the end of the restriction period because demand for prepayment was putatively "refused" *only to the extent* that the owner accepted a restriction on the use of the property as part of the equity loan transaction." Pls.' Br. filed June 15, 2007, at 7. Park Terrace and Mullica's argument distills to an assertion that, if a breach accrued at all, it was only a breach for the twenty-year use-restriction period agreed to as part of the incentive loan transactions, and thus the statute of limitations should only apply to bar their claims for that twenty-year use-restriction period, and not beyond. Responding plaintiffs' argument relies on the proposition that "it is the imposition of the restriction which acts as the denial." *Id.* at 8.

Defendant disagrees with responding plaintiffs' characterization of the "nonperformance" that triggered accrual of plaintiffs' claims:

> [I]t was the refusal to allow prepayment at the time of the requests to prepay – not the imposition of the 20-year restrictive use provisions of the equity loans – that constituted the denial [of] plaintiffs' prepayment requests and the non-performance upon which the plaintiffs' claim of liability is based. . . . The Government's refusal to accept prepayment and the parties' transaction of the equity loans were separate events.

Def.'s Br. filed Dec. 6, 2007, at 10-11. Defendant also highlights *Franconia's* holding that "the statute of limitations governing claims for breach of the right to prepay a Section 515 loan begins to run either at the time of an actual breach, such as a rejection of an actual attempt to prepay, or *earlier*, if the borrower

elects to treat Congress' alleged repudiation of this right as a present breach." Def.'s Br. filed June 5, 2007, at 4. Thus, defendant asserts, "[t]he right of election does not extend past an actual breach." *Id.* Defendant also argues that Park Terrace's and Mullica's claims do not qualify as "continuing claim[s] for accrual purposes," *id.* (citing *Ariadne*, 133 F.3d at 879), so responding plaintiffs may not treat the Government's continuing to preclude them from prepaying after the initial rejection as an opportunity to assert additional claims.

Defendant's characterization of the denial as constituting a refusal to perform the Government's obligation is correct. The court holds that the Government committed a breach – and, consequently, that the claims accrued – when FmHA refused to accept prepayment in the face of the borrowers' unfettered and absolute right to prepay. It is of no moment whether the refusal came by means of an outright denial accompanied by no offer of incentives or by an offer of incentives to induce an agreement to further restrict the use of the property. Because the right to prepay was absolute, any conditioning of the corresponding obligation to accept prepayment, unfettered, constituted a breach by the Government of its obligation and duty to perform. The imposition of the use-restriction period as part of the incentive-loan transaction did not constitute the Government's denial and breach; rather, any compromise of the absolute right to prepay, such as the offer of incentives as an "in lieu of" prepayment transaction, caused the breach to accrue.

If Park Terrace and Mullica are to argue successfully that claims survive beyond the breach

accrual and subsequent running of the six-year statute of limitations, they must do so pursuant to the continuing claims doctrine. The Federal Circuit has allowed the "continuing claims doctrine . . . to save later arising claims even if the statute of limitations has lapsed for earlier events." *Ariadne*, 133 F.3d at 879. However, "[i]n order for the continuing claims doctrine to apply, the plaintiff's claim must be inherently susceptible to being broken down into a series of independent and distinct events or wrongs, each having its own associated damages." *Brown Park Estates-Fairfield Dev. Co. v. United States*, 127 F.3d 1449, 1456 (Fed. Cir. 1997).

In *Ariadne* the Federal Circuit addressed the applicability of the continuing claims doctrine in the context of a case coming under the rule of *United States v. Winstar Corp.*, 518 U.S. 839, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996). A breach of contract claim was predicated on Congress' enactment of the Financial Institutions Reform, Recovery, and Enforcement Act, 12 U.S.C. §§ 1464(t)(1)-(2) (1994) ("FIRREA"), which directed federal regulatory agencies to limit a bank's use of its contractual right, in connection with its acquisition of failing thrifts, to special accounting treatment. Finding its claim barred by the applicable statute of limitations, plaintiff invoked the continuing claims doctrine to support separate claims for each year in which it sought performance of its contractual rights. The Federal Circuit rejected the applicability of the continuing claims doctrine to the facts presented:

> Here, Ariadne seeks compensation for repudiation of a contract that promised continuing performance into the future. There

> was a single repudiation by which the government made clear its intent to reject the terms of the contracts. Each subsequent denial of the use of supervisory goodwill does not give rise to a separate cause of action. Rather, the government's continued refusal to allow the use of supervisory goodwill flows from its original repudiation. Because Ariadne's claim does not involve a series of distinct events, each giving rise to an independent cause of action, the continuing claims doctrine does not act to preserve its claim.

Ariadne, 133 F.3d at 879. The court reaffirmed the law that a claim accrues when all the events have occurred that fix the Government's liability and entitle plaintiff to institute an action. *Id.* Because the Government had breached its contractual duty to permit plaintiff to use special accounting treatment upon the enactment of FIRREA, the Federal Circuit ruled that all the events that would fix the Government's liability and entitle plaintiff to relief occurred beyond the applicable statute of limitations.

Park Terrace and Mullica similarly are unable to invoke the continuing claims doctrine to postpone the accrual of their claims. While Park Terrace and Mullica seek compensation for a contractual right that promised performance into the future (the honor of their absolute right to prepay their loans at any time), a single repudiation made clear the Government's intent to dishonor the terms of the contract. Any subsequent or continuing denial by the Government of responding plaintiffs' rights to prepay their loans and exit the program pursuant to ELIHPA does not give rise to a new cause of action, but flows from the

Government's original repudiation and later breach occurring in 1992 and 1991. As these subsequent and/or continuing refusals are not distinct events, they cannot come within the continuing claims doctrine. The Government's liability was fixed upon its failure to perform in the face of responding plaintiffs' unfettered and absolute rights to prepay their loans. This accrual occurred no later than 1992 and 1991, more than six years prior to the filing of this suit. Park Terrace and Mullica therefore cannot assert claims for the extended period beyond which the breach claims accrued.

IV. *Plaintiffs' takings claims*

Defendant seeks dismissal of the takings claims of all four plaintiffs pleaded in Count II of the complaint. Disputing plaintiffs' characterization of the rights at issue as a taking of their housing projects, defendant argues that plaintiffs' prepayment rights were "based strictly upon the terms of the promissory notes, and [are] thus [] contract right[s]." Def.'s Br. filed June 5, 2007, at 7. The Government's refusal to accept prepayment and honor plaintiffs' contract rights, according to defendant, constituted a breach, not a taking. Defendant cites the decisions of the Court of Federal Claims in the remand of *Franconia*, 61 Fed. Cl. 718, 739-40 (2004), and in *Allegre Villa v. United States*, 60 Fed. Cl. 11, 18-19 (2004), for the proposition that Congress, in enacting ELIHPA, acted not in a sovereign capacity, but in its proprietary capacity, with the result that the takings claims must be rejected. *See* Def.'s Br. filed June 5, 2007, at 8.

Plaintiffs counter that "[a] claim under the takings clause may be available when alternative contract

rights are not." Pls.' Br. filed June 15, 2007, at 10. Plaintiffs submit that the Government was not acting in its proprietary capacity in enacting ELIHPA, as Congress sought "to ensure an adequate supply of low income housing for the public benefit – the very essence of the exercise of sovereign powers of eminent domain for public use." *Id.* Ultimately, plaintiffs submit that they may maintain

> an alternative takings claim . . . based, not on the refusal to allow prepayment, but on the transaction in which the Government sought to extinguish the rights of Responding Plaintiffs to vindicate their harm by bootstrapping on to the equity loan process a set of "application" documents which would later be relied on to foreclose the unborn breach of contract claims.

Id. at 11. Plaintiffs' position distills to the following proposition: the Government effected a taking of plaintiffs' choses in action by requiring, as part of the incentive-loan application process, the selfsame acts that would constitute an accrual of the breach claims now foreclosed by application of the statute of limitations.

The court evaluates whether a takings claim has been stated under a two-part test. First, the court must determine whether plaintiffs have established a property interest for purposes of the Fifth Amendment. *Colvin Cattle Co.*, 468 F.3d at 806. Second, once a property interest is identified, the court must determine whether the governmental action at issue amounts to a compensable taking of that property. *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206, 1213 (Fed. Cir. 2005). "A takings claim

has limited application when a claimant has a viable breach remedy." *Detroit Edison Co. v. United States*, 56 Fed. Cl. 299, 301 (2003). Although rights existing independently of a contract may be brought pursuant to a takings claim, *see Integrated Logistics Support Sys. Int'l, Inc. v. United States*, 42 Fed. Cl. 30, 34-35 (1998), when a contract between a private party and the Government creates the property right subject to a Fifth Amendment claim, the proper remedy for infringement lies in contract, not taking. *Commonwealth Edison Co. v. United States*, 56 Fed. Cl. 652, 656 (2003); *see also Sun Oil Co. v. United States*, 572 F.2d 786, 818, 215 Ct. Cl. 716 (Ct. Cl. 1978).

Plaintiffs undeniably possess a contract right that constitutes an established property interest. *See Cienega Gardens v. United States*, 331 F.3d 1319, 1329 (Fed. Cir. 2003) ("[T]here is also ample precedent for acknowledging a property interest in contract rights under the Fifth Amendment."). However, plaintiffs have not alleged any facts to suggest that the property rights underlying their claims exist independently of their contracts with the Government. Because plaintiffs' contractual rights arise from and were created by the bilateral contracts that plaintiffs entered into with the Government, plaintiffs' remedies lie in breach of contract claims.

The argument that Congress acted in a sovereign capacity in enacting ELIHPA, rather than in a proprietary capacity, has not been upheld. *See, e.g., Franconia*, 61 Fed. Cl. at 739-40; *Allegre Villa*, 60 Fed. Cl. at 18-19. Moreover, plaintiffs' position in the case at bar is distinguishable from those in which the Federal Circuit has allowed takings claims to proceed.

See Cienega Gardens, 331 F.3d 1319; *Chancellor Manor v. United States*, 331 F.3d 891 (Fed. Cir. 2003). In *Cienega Gardens* and *Chancellor Manor*, plaintiffs entered into loan agreements with private lenders that were insured by the Department of Housing and Urban Development. Congress' enactment of ELIHPA was held not to effect a repudiation or subsequent breach of contract as to these plaintiffs because plaintiffs' contracts were with private lenders, so they were not in privity with the Government. The present action, in contrast, involves plaintiffs that entered into contracts directly with the Government through FmHA. Given that plaintiffs are in privity with the Government, the contracts provide the remedy for the prepayment restrictions and ensuing breach.

Regarding plaintiffs' novel assertion of an "alternative takings claim," defendant correctly notes that, even if such claim could be based on these facts, it would be barred as beyond the six-year statute of limitations. The accrual of any such claims would have occurred at the time of the equity loan transactions in 1992 and 1991.[10] Moreover, the bilateral nature of the equity loan transactions undercuts plaintiffs' position. It is not the Government's action that "foreclose[d] the unborn breach of contract claims." Pls.' Br. filed June 15, 2007, at 11. The breach of contract claims were

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[10] Furthermore, even if plaintiffs are arguing that the extinguishment of their breach of contract claims constitutes the accrual of their alternative takings claims, that accrual would have occurred at least by June 18, 1997, and July 16, 1998, six years from the date of the respective incentive-loan transactions. A timely complaint presenting such claims must have been filed by June 18, 2003, and July 16, 2004, respectively. The present complaint was filed on June 22, 2005.

born of plaintiffs' actions in seeking to prepay and the Government's corresponding failure to honor its performance obligation to accept prepayment in the face of plaintiffs' unfettered and absolute prepayment rights. It was plaintiffs' inaction in failing to sue on their claims for breach of contract any time within six years after these events took place that extinguished plaintiffs' breach of contract claims. No taking lies upon these facts.

CONCLUSION

Accordingly, based on the foregoing,

IT IS ORDERED, as follows:

1. Defendant's Motion for Judgment on the Pleadings[] Dismissing the Claims of Park Terrace Limited and Mullica West Limited is granted based on this opinion and the May 18, 2007 opinion insofar as it is relied upon herein. Pursuant to RCFC 54(b), there being no just reason for delay, the Clerk of the Court shall enter judgment dismissing the complaint as to plaintiffs Park Terrace Limited and Mullica West Limited without prejudice for lack of subject matter jurisdiction.

2. The takings claims set forth in Count II by plaintiffs Park Terrace Limited, Mullica West Limited, Park Terrace East Limited, and Tamerlane, Limited are dismissed for failure to state a claim upon which relief can be granted. Pursuant to RCFC 54(b), there being no just reason for delay, the Clerk of the Court shall enter judgment for defendant dismissing Count II of the complaint as to all four plaintiffs.

3. The Motion of Plaintiffs, Park Terrace Limited and Mullica West Limited, To Strike, in Part, Defendant's Supplemental Brief in Support of Dismissal for Violation of Order Dated May 18, 2007, is denied.

No costs.

s/ Christine O.C. Miller

Christine Odell Cook Miller
Judge

APPENDIX D

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

No. 05-677C

[Filed May 18, 2007]

TAMERLANE, LIMITED, PARK TERRACE LIMITED, PARK TERRACE EAST LIMITED, and MULLICA WEST LIMITED, Plaintiffs,	)
v.	)
THE UNITED STATES, Defendant.	)

JUDGES: Christine Odell Cook Miller, Judge.

MEMORANDUM ORDER AND OPINION

This case is one of several hundred unique cases with over 600 plaintiffs and 800 properties involving the Government's cancelling prepayment rights of owners of low-income housing. See Transcript of Proceedings, Tamerlane, Ltd. v. United States, No. 05-677C, at 5 (Fed. Cl. Jan. 25, 2007) ("Tr."). *See generally Franconia Assocs. v. United States*, 536 U.S. 129 (2002) (in lieu of suffering the breach, certain

developers proceeded under new contracts with new prepayment restrictions). Before the court after briefing and oral argument is Defendant's Motion for Judgment on the Pleadings, Dismissing the Claims of Park Terrace Limited and Mullica West Limited.[1] Defendant seeks dismissal of plaintiffs' claims pursuant to RCFC 12(c). Defendant argues that plaintiffs failed to file their complaints in the United States Court of Federal Claims within six years of accrual. *Id.*; *see also* Order entered Nov. 15, 2006 (lifting long-standing settlement stay for all purposes to address jurisdictional issues).[2] Plaintiffs ask the court to deny defendant's motion arguing that (1) the motion is improper as it relies on documents outside the pleadings; and (2) plaintiffs "proffer facts sufficient to overcome the defense or to create a material issue for trial with respect to whether their claims accrued, as the Government contends." Pls.' Br. filed Dec. 18, 2006, at 1; see also Pls.' Br. filed Dec. 18, 2006, at 19, 20. Alternatively, plaintiffs argue that, if the court grants defendant's motion for judgment on the pleadings, jurisdiction shall be retained to hear

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[1] This motion has been raised only with respect to two plaintiffs, Park Terrace Limited and Mullica West Limited. Defendant has not raised a statute of limitations defense as to the other plaintiffs in this case, Park Terrace East and Tamerlane Limited. The term "plaintiffs" herein refers to Park Terrace Limited and Mullica West Limited.

[2] Following oral argument, the case was stayed for a period not to exceed ninety days in order to permit the parties to reinstate the two plaintiffs' claims to the settlement queue. *See* Order entered Jan. 3, 2006 (granting parties' joint motion for stay of proceedings and referring the cases to Judge Marian Blank Horn for ADR); *see also* Order entered Nov. 15, 2006 (lifting stay and allowing defendant to file dispositive motion).

plaintiffs' claims "as to the period after the restrictions expire," because those claims "accrued only with the filing of this suit." Id. at 21.

BACKGROUND

The subject of this litigation involves entity property owners that entered into loan agreements with the Farmers Home Administration of the United States Department of Agriculture ("FmHA") to provide rental housing for low- and moderate-income persons. These loans were entered into pursuant to section 515 and section 521 of the Housing Act of 1949, Pub. L. No. 81-171, 63 Stat. 413 (codified as amended at 42 U.S.C. §§ 1485, 1490a (2000)) ("Section 515" and "Section 521," respectively), which obligated borrowers to operate the properties according to FmHA regulations in exchange for favorable loan terms. *See* Compl. filed June 22, 2005, ¶¶ 16, 17, 20. Plaintiffs contend that the Government breached their loan agreements through the enactment and implementation of the Emergency Low Income Housing and Preservation Act of 1987, Pub. L. No. 100-242, 101 Stat. 1877 (1988) ("ELIHPA"), and the Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified in relevant part at 42 U.S.C. § 1472(c)).

In 1979 Congress determined that many Section 515 and Section 521 borrowers who entered into loan agreements with the FmHA were choosing to exercise a pre-pay option. *Franconia Assoc.*, 536 U.S. at 135. This option allowed borrowers to terminate early their involvement in FmHA's low- and moderate-income housing program. *Id.* Congress determined that prepayment of these loans was disrupting the

availability of affordable housing. *Id.*; *see also* H.R. Rep. No. 96-154, slip op. at 43 (1979) ("Recently many section 515 Rural rental projects have started to prepay their mortgages and be diverted from housing the low- and moderate-income families who are the intended beneficiaries of the program. There are potentially 30,000 section 515 units that could be lost in this way."). Accordingly, Congress amended the National Housing Act to place significant restrictions on the circumstances under which FmHA could accept prepayment. Housing and Community Development Amendments of 1979, Pub. L. No. 96-153, 93 Stat. 1101, § 503. The Supreme Court summarized these amendments in *Franconia Assoc.*, 536 U.S. at 135, as follows:

> In these 1979 amendments, Congress prohibited the FmHA from accepting prepayment of any loan made before or after the date of enactment unless the owner agreed to maintain the low-income use of the rental housing for a 15-year or 20-year period from the date of the loan. 93 Stat. 1134-1135. That requirement could be avoided if the FmHA determined that there was no longer a need for the low-cost housing. *Id.*, at 1135. . . .
>
> The 1979 amendments applied to all program loans, past, present, and future. In 1980, however, Congress further amended the National Housing Act to eliminate retroactive application of the § 515 prepayment limitations imposed by the 1979 legislation. The Housing and Community Development Act of 1980, 94 Stat. 1614, provided that the prepayment

> restrictions would apply only to loans entered into after December 21, 1979.

In 1987 Congress again became concerned about the decreasing number of low- and moderate-income housing units available because of an increase in the number of prepayments of Section 515 loans. *See Franconia Assoc.*, 536 U.S. at 135 (citing H.R. Rep. No. 100-122, p.53, U.S. Code Cong. & Admin. News 1987, pp. 3317, 3369). In response to these concerns, Congress passed ELIHPA. The Housing and Community Development Act of 1992, Pub. L. No. 102-550, 106 Stat. 3672 (codified in relevant part at 42 U.S.C. § 1472(c)(2000)), amended ELIHPA to "impose[] permanent restrictions upon prepayment of § 515 mortgages entered into before December 21, 1979." *Franconia Assoc.*, 536 U.S. at 136; ELIHPA, Pub. L. 100-242, 101 Stat. 1877 (codified as amended at 12 U.S.C. §§ 4101-4124, 4141-4147 (2000)). ELIHPA provides that, before FmHA could accept the prepayment of a Section 515 loan,

> "the [FmHA] shall make reasonable efforts to enter into an agreement with the borrower under which the borrower will make a binding commitment to extend the low income use of the assisted housing and related facilities involved for not less than the 20-year period beginning on the date on which the agreement is executed." 42 U.S.C. § 1472(c)(4)(A) (1994 ed.).

Franconia Assoc., 536 U.S. at 136. ELIPHA also provides for incentives for borrowers that agreed to extend the low-income use of their housing including, *inter alia*: (1) reduction in the interest rate on the loan; (2) increase in the rate of return; and (3) additional

loans to the borrower. 42 U.S.C. § 1472(c)(4)(B). With certain limited exceptions, if FmHA and the borrower cannot reach an agreement, the property owner seeking prepayment, "after a reasonable period . . . [FmHA] shall require the borrower . . . to offer to sell the assisted housing and related facilities involved to any qualified nonprofit organization or public agency at a fair market value." 42 U.S.C. § 1472(c)(5)(A)(i) (2000).

FACTS

The following facts are not disputed in any material respect. Pursuant to Section 515 and 521, on July 28, 1978, plaintiff Park Terrace Limited ("Park Terrace"), a Pennsylvania limited partnership, borrowed two lump sums from FmHA in the amounts of $ 850,000 and $ 125,000. *See* Partnership Real Estate Mortgage For Pennsylvania, at 1;[3] *see* Compl.

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[3] In response to the court's post-argument telephonic request, plaintiffs provided copies of the following documents on April 17, 2007:

1. Park Terrace Limited (1978):
   A. Promissory Note ($ 850,000)
   B. Promissory Note ($ 125,000)
   C. Real Estate Mortgage
   D. Loan Agreement
   E. Security Agreement

2. Park Terrace Limited (1993):
   A. Promissory Note
   B. Real Estate Mortgage
   C. Loan Agreement
   D. Security Agreement

¶¶ 17, 18. In accordance with Section 515 and Section 521, Park Terrace executed a number of loan documents, including a loan agreement, a promissory note, and a real estate mortgage. *See* Compl. ¶¶ 17, 18. The two promissory notes obligated Park Terrace to repay the loans in equal monthly installments spread over fifty years with a low fixed interest rate. Under the payment schedule for the loans, the final monthly payment is due on July 28, 2028. In exchange the favorable loan terms, Park Terrace agreed to numerous restrictions on the use of its property "[s]o long as the loan obligations remain unsatisfied." Park Terrace Loan Agreement (1978), at 5. Restrictions included, *inter alia:* (1) agreeing to use the housing exclusively as rental property and "related facilities for eligible occupants," Park Terrace Loan Agreement, at 6; (2) submitting annual budgets and operating plans to the Government for approval; and (3) using any return on investment that exceeds 8% per annum of

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3. Mullica West Limited (1977):
   A. Promissory Note ($ 1,809,050)
   B. Promissory Note ($ 1,300,000)
   C. Real Estate Mortgage ($ 1,809,050)
   D. Real Estate Mortgage ($ 1,300,000)
   E. Loan Agreement ($ 1,809,050)
   F. Loan Agreement ($ 1,300,000)
   G. Security Agreement ($ 1,809,050)
   H. Security Agreement ($ 1,300,000)

4. Mullica West Limited (1991):
   A. Loan Agreement
   B. Security Agreement
   C. Real Estate Mortgage.

Coinciding with the filing of this order and opinion, the court directs plaintiffs to file one copy of these documents.

borrower's initial investment in a manner that will "best benefit the tenants" or, alternatively, refunding the excess to the tenants. Park Terrace Loan Agreement (1978), at 5. Both promissory notes allowed Park Terrace the ability to prepay its loans. *See* Park Terrace Promissory Note (1978) ($ 125,000), at 2 ("Prepayments of scheduled installments, or any portion thereof, may be made at any time at the option of Borrower."); Park Terrace Promissory Note (1978) ($ 850,000), at 2 (same).

Similarly, on May 31, 1977, Mullica West Limited ("Mullica"), a New Jersey limited partnership, borrowed $ 1,300,000 from FmHA. Later that same year, on November 30, 1977, Mullica borrowed an additional $ 1,809,050 from FmHA. The two loans, entered into pursuant to Section 515 and Section 521, obligated Mullica to operate its property according to FmHA regulations. See Compl. ¶ 20. The loans were to be repaid over a period of forty years in equal monthly installments, with low fixed interest rates. See Mullica Promissory Note, Nov. 30, 1977, at 1; Mullica Promissory Note, May 31, 1977, at 1. Unless pre-paid, the final monthly payments on these loans are due on June 17, 2036. Mullica Real Estate Mortgage for New Jersey, June 18, 1991, at 1 (noting that May 31, 1977 and November 30, 1977 loans were re-amortized on June 18, 1991). Both promissory notes allowed Mullica to prepay its loans "at any time at the option of Borrower." Mullica Promissory Note, Nov. 30, 1977, at 2; Mullica Promissory Note, May 31, 1977, at 2 (same). In exchange for favorable loan terms, Mullica agreed to abide by extensive restrictions on the use and alienation of its property. Mullica Real Estate Mortgage (Nov. 30, 1977) at 4-6; Mullica's RRH Loan to Profit Type Corporation Operating on a Limited

Profit Basis, August 25, 1977 ("Mullica Loan Agreement of August 25, 1977"). In addition to agreeing not to lease, assign, sell, transfer, or encumber the property without prior permission from the Government, Mullica also promised "so long as the loan obligations remain unsatisfied," *inter alia*: (1) to reduce rents the following year or use excess funds in a manner that will benefit tenants if the return on investment in any one year exceeds pre-established levels, see Mullica Loan Agreement of August 25, 1977, ¶ 10(b); (2) maintain books and records relating to the housing's financial affairs and provide such documents to the Government to inspect at "all reasonable times" id. ¶ 10(c); and (3) unless the Government gives prior consent, not to use the housing for any purpose "other than as rental housing and related facilities for eligible occupants," id. ¶ 10(e)(1). See also Mullica's RRH Loan to Profit Type Corporation Operating on a Limited Profit Basis, May 31, 1977 ("Mullica Loan Agreement of May 31, 1977") (containing similar restrictions).

Aware of the passage of ELIPHA and the Housing and Community Development Act of 1992, Park Terrace elected to apply for an equity loan, one of the alternative incentives available to borrowers under the new laws. Decl. of Bart J. Axelrod, on Behalf of Park Terrace Ltd., Dec. 18, 2006, ¶¶ 5-6. On November 19, 1991, Mr. Axlerod, President of Bala Realty Advisors, Inc., the General Partner of Park Terrace Investors, wrote to Jack Kauffman, Assistant District Director for FmHA. "This letter will serve as a request to pay off the remaining mortgage balance for the [Park Terrace Apartments]." DX 1 at 1. Park Terrace contends that this letter was a "*pro forma* request for 'prepayment'" in order to secure an equity loan. Pls.'

Br. filed Dec. 18, 2006, at 3. On July 16, 1993, Park Terrace borrowed an additional $ 925,000. *See* Park Terrace Real Estate Mortgage for Pennsylvania, July 16, 1993; Park Terrace Promissory Note, July 16, 1993. Once again, the payments were spread out in equal installments over fifty years and carried a low fixed interest rate. Park Terrace Promissory Note, July 16, 1993. Unlike the mortgage and loan agreements entered into in 1978, however, the mortgage that Park Terrace entered into in 1993 contained the following clause:

> The borrower and any successors in interest agree to use the housing for the purpose of housing low- and moderate-income people eligible for occupancy as provided in Section 515 of Title V of the Housing Act of 1949 and FmHA regulations then extant during this 20 year period beginning the date of this mortgage. A tenant may seek enforcement of this provision as well as the Government. No person occupying or wishing to occupy the housing shall be required to vacate or be denied occupancy prior to the close of such 20 year period because of early repayment.

Park Terrace Real Estate Mortgage for Pennsylvania, July 16, 1993, at 3; see also Park Terrace Loan Agreement, April 1, 1993, ¶ 7(h) (similar). Therefore, by accepting the equity loan, Park Terrace obligated itself to continue providing low- and moderate-income housing through 2013. Unless prepaid, the loans entered into in 1978 will not be liquidated fully until 2028, while the equity loan entered into in 1993 will not be fully liquidated until 2043. *See, e.g.*, Park

Terrace Real Estate Mortgage for Pennsylvania, July 16, 1993, at 1.

Similarly, Mullica, aware of new laws preventing prepayment of its 1977 FmHA loans, also elected to pursue the equity loan option. Decl. of Bart J. Axelrod, on Behalf of Mullica West Ltd., Dec. 18, 2006, ¶¶ 5-6, 12. On October 11, 1988, Larry A. Wanerman wrote on behalf of Mullica West Apartments to Ernest Grunow of FmHA. "This letter will serve as a request to pay off the remaining mortgage balance for [Mullica West Apartments]." DX 1 at 6. Mullica also argues that this letter was a "*pro forma* request for 'prepayment.'" Pls.' Br. filed Dec. 18, 2006, at 3. As part of the new mortgage, Mullica agreed:

> The borrower and any successors in interest agree to use the housing for the purpose of housing very low-, low- and moderate-income people eligible for occupancy as provided in FmHA regulations then extant during this 20 year period beginning on the date of this mortgage instrument. A tenant may seek enforcement of this provision as well as the Government. No person occupying or wishing to occupy the housing shall be required to vacate or be denied occupancy prior to the close of such 20 year period because of early prepayment.

Mullica Real Estate Mortgage for New Jersey, June 18, 1991, at 4. Accordingly, by accepting the equity loan as part of an incentive package, Mullica obligated itself to continue providing low- and moderate-income housing through 2011. The loans entered into in 1977 and 1991 will not be liquidated fully until 2036. *See*

Mullica Real Estate Mortgage of New Jersey, June 18, 1991, at 1.

DISCUSSION

1. *Standard of Review*

The Court of Federal Claims is empowered by the Tucker Act, 28 U.S.C. § 1491(a)(1) (2000), to "render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States." Plaintiffs allege breach of contract by the United States and a taking of property without compensation, a violation of the Fifth Amendment. These claims fall squarely within the Tucker Act jurisdiction.

1) *Motion for Judgment on the Pleadings*

Defendant has moved pursuant to RCFC 12(c) for judgment on the pleadings. RCFC 12(c) provides: "After the pleadings are closed, but within such time as not to delay the trial, any party may move for judgment on the pleadings." Matters outside the pleadings are presented by defendant. Thus, because "matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in RCFC 56, and all parties shall be given reasonable opportunity to present all material made pertinent." RCFC 12(c); *see also John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1349 n.7 (Fed. Cir. 2006); *Colvin Cattle Co. v. United States*, 468 F.3d 803, 806 (Fed. Cir. 2006); *Brubaker Amusement*

Co. v. United States, 304 F.3d 1349, 1355-56 (Fed. Cir. 2002).

Under Rule 56(c) "[s]ummary judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law." *Brubaker Amusement Co.*, 304 F.3d at 1356 (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). No genuine issue of material fact exists when a rational trier of fact could only arrive at one reasonable conclusion. *See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986); *Hall v. Aqua Queen Mfg., Inc.*, 93 F.3d 1548, 1553 n.3 (Fed. Cir. 1996). In such cases the need for a trial is not present, and the motion for summary judgment must be granted. Summary judgment, however, will not be granted if "the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable [trier of fact] could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *see also Eli Lilly & Co. v. Barr Labs., Inc.*, 251 F.3d 955, 971 (Fed. Cir. 2001); *GE v. Nintendo Co.*, 179 F.3d 1350, 1353 (Fed. Cir. 1999).

If the nonmoving party produces sufficient evidence to raise a question as to the outcome of the case, the motion for summary judgment should be denied. "The moving party in a summary judgment motion has the burden to show 'that there is an absence of evidence to support the non-moving party's case[.]'" Crown Operations Int'l v. Solutia Inc., 289 F.3d 1367, 1377 (Fed. Cir. 2002) (quoting Celotex Corp., 477 U.S. at 322-23 (1986)). The benefit of all reasonable presumptions and inferences runs to the party opposing summary judgment. Matsushita Elec. Indus.,

475 U.S. at 587-88; Monon Corp. v. Stoughton Trailers, Inc., 239 F.3d 1253, 1257 (Fed. Cir. 2001); *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1574 (Fed. Cir. 1984) (noting that non-moving party shall "receive the benefit of all applicable presumptions, inferences, and intendments").

2) *Statute of limitations as a jurisdictional requirement*

Defendant seeks dismissal of plaintiffs' claims for lack of subject matter jurisdiction, or, alternatively, for failure to state a claim upon which relief can be granted. Defendant argues that the statute of limitations bars plaintiffs' claims under the Tucker Act, which provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501 (2000).

The six-year statute of limitations "set forth in § 2501 [of Title 28] is a jurisdictional requirement." *Bianchi v. United States*, 475 F.3d 1268, 1274 (Fed. Cir. 2007); *John R. Sand & Gravel*, 457 F.3d at 1354-55 ("The six-year statute of limitations set forth in section 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims."); *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc) ("It is well established that statutes of limitations for causes of action against the United States, being conditions on the waiver of sovereign immunity, are jurisdictional in nature."). Because the requirement of section 2501 is jurisdictional it may not be waived. *John R. Sand & Gravel*, 457 F.3d at 1354 (citing

Hopland Band of Pomo Indians v. United States, 855 F.2d 1573, 1576-77 (Fed. Cir. 1988))

As defendant recognizes, *see* Def.'s Br. filed Nov. 16, 2006, at 4 n.5, some decisions of the United States Court of Appeals for the Federal Circuit and the Court of Federal Claims have held that claims failing to satisfy section 2501 should be dismissed for failure to state a claim rather than for lack of subject matter jurisdiction. *See, e.g., Venture Coal Sales Co. v. United States*, 370 F.3d 1102, 1105 n.2 (Fed. Cir. 2004) ("The most precise ground for the trial court's decision here . . . would seem to be that [plaintiff] failed to make its claim within the required limitations period–that is not a question of subject matter jurisdiction of the court."); *Ariadne Fin. Servs. Pty. Ltd. v. United States*, 133 F.3d 874, 878 (Fed. Cir. 1998) ("As a threshold matter, this statutory language confirms that the question of a time bar on [plaintiff's] claim does not affect the subject matter jurisdiction of the Court of Federal Claims. The Court of Federal Claims has subject matter jurisdiction to adjudicate cases arising under the Tucker Act regardless of the timeliness of [plaintiff's] actions. [Plaintiff's] untimeliness can, however, bar its eligibility to invoke that jurisdiction."). Panels of the Federal Circuit continue to disagree on this issue, as evidenced by Judge Newman's dissent in the recent case of *John R. Sand & Gravel*, 457 F.3d at 1361. In dissenting from the majority's holding that the statute of limitations contained in section 2501 is jurisdictional, Judge Newman stated:

> [T]he Court of Federal Claims, without dispute, had jurisdiction of the parties and the subject matter. . . . The text of the statute confirms that

> the limitations period is applied to claims of which the Court of Federal Claims already "has jurisdiction" . . . .
>
> Contrary to the position of the panel majority, the limitations period is not itself a matter of jurisdiction.

Id. at 1361-62 (citations omitted); *see also Martinez*, 333 F.3d at 1320 (Judges Plager, Mayer, Newman, Gajarsa, Linn, and Dyk, dissenting). Despite a nascent in shift in the more recent appellate decisions, the court follows the predominant view that a motion to dismiss a complaint as time-barred by the statute of limitations properly is considered as a motion to dismiss for lack of subject matter jurisdiction, given the en banc decision in *Martinez* and the majority opinion in *John R. Sand & Gravel*.

2. *Statute of limitations in FmHA loan cases*

The issue presented in this case originally was addressed in *Franconia Associates v. United States*, 43 Fed. Cl. 702 (1999), *aff'd*, 240 F.3d 1358 (Fed. Cir. 2001), *rev'd*, 536 U.S. 129 (2002). The trial court had dismissed plaintiffs' claims for lack of subject matter jurisdiction based on the statute of limitations. *Id.* at 709. The Federal Circuit affirmed the lower court's decision, ruling that the statute of limitations began to run on February 5, 1988, when ELIHPA was enacted. *Franconia Assocs. v. United States*, 240 F.3d 1358, 1362-63 (2001), *rev'd*, 536 U.S. 129 (2002). On January 4, 2002, the United States Supreme Court granted certiorari. In its June 10, 2002 opinion, the Supreme Court reversed the Federal Circuit, holding:

> ELIHPA's enactment, we conclude, qualified as a repudiation of the parties' bargain, not a present breach of the loan agreements. Accordingly, breach would occur, and the six-year limitations period would commence to run, when a borrower tenders prepayment and the Government then dishonors its obligation to accept the tender and release its control over use of the property that secured the loan.

536 U.S. at 133.

Following the Supreme Court's decision, this court had an opportunity to address the issue again in *Allegre Villa v. United States*, 60 Fed. Cl. 11 (2004). This court stated:

> The passage of ELIHPA and HCDA operated as a repudiation on the part of the Government, which "ripens into a breach prior to the time for performance only if the promisee 'elects to treat it as such.'" *Id.* The option to choose the date of breach by filing suit arises because repudiation "give[s] the promisee the right of electing . . . to wait till the time for [the promisor's] performance has arrived, or to act upon [the repudiation] and treat it as a final assertion by the promisor that he is no longer bound by the contract." *Roehm v. Horst*, 178 U.S. 1, 13, 20 S. Ct. 780, 44 L. Ed. 953 (1900). Contracts with plaintiffs for which the right to prepayment has not yet vested were breached on the date this lawsuit was filed, because those plaintiffs have

> chosen to treat the Government's repudiation as a breach.

Id. at 17.

The central question before the court on defendant's motion is whether FmHA's denial of Mullica's and Park Terrace's offers of prepayment constitute a breach of contract, such that the statute of limitations began to run in 1988 and 1991, respectively. Both plaintiffs argue against this proposition. First, Mullica contends that it never received a final denial of its prepayment request. According to Mullica, the October 11, 1988 letter to FmHA could not trigger the statute of limitations because the Government's response on March 30, 1989, was not a final denial. Second, Mullica and Park Terrace insist that "the 'prepayment' letters on which the Government relies were merely an exercise in following the steps prescribed by the Government to secure 'incentives.'" Pls.' Br. filed Dec. 18, 2006, at 16. Plaintiffs alternatively argue that the statute of limitations does not bar their claims "as to the period after the restrictions expire," because those claims "accrued only with the filing of this suit." Pls.' Br. filed Dec. 18, 2006, at 21.

1) *Final denial of Mullica's prepayment request*

Mullica contends that because it never received a "*final*, unequivocal denial" of prepayment, payment was never tendered. Pls.' Br. filed Dec. 18, 2006, at 4. Consequently, the statute of limitations commenced to run when it filed suit in the Court of Federal Claims on June 22, 2005, and not before.

The statute of limitations in the Tucker Act requires that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. § 2501; *see Alliance of Descendants of Tex. Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). It is a jurisdictional requirement in the Court of Federal Claims. *Fannie Mae v. United States*, 469 F.3d 968, 973 (Fed. Cir. 2006). "A claim accrues when all events have occurred that fix the alleged liability of the Government and entitle the plaintiff to institute an action[,]" *Tex. Land Grants*, 37 F.3d at 1481; *see John R. Sand & Gravel*, 457 F.3d at 1355; *Hopland Band*, 855 F.2d at 1577 (stating that cause of action accrues "only when all the events which fix the government's alleged liability have occurred *and* the plaintiff was or should have been aware of their existence"). A cause of action accrues when a plaintiff is "armed with the facts about the harm done to him." *United States v. Kubrick*, 444 U.S. 111, 123, 100 S. Ct. 352, 62 L. Ed. 2d 259 (1979). In the cases that have been spawned by Congress's passage of ELIHPA, the Supreme Court has held that "breach would occur, and the six-year limitations period would commence to run, when a borrower tenders prepayment and the Government then dishonors its obligation to accept the tender and release its control over use of the property that secured the loan." *Franconia Assoc.*, 536 U.S. at 130.

By letter dated October 11, 1988, addressed to Mr. Grunow of FmHA, Mr. Wanerman, on behalf of Mullica West Apartments, requested to prepay the outstanding balance on Mullica's mortgage, stating: "[T]his letter will serve as a request to pay off the remaining mortgage balance for the above referenced

property. Please contact me at your earliest convenience to review what procedure should be followed regarding this payoff of the mortgage." DX 1 at 6. On March 30, 1989, Howard Henderson, District Director of FmHA, responded to Mr. Wanerman's letter:

> After careful consideration, Farmers Home Administration (FmHA) is unable to accept your offer to prepay the loan on Mullica West Apartments at this time. . . .
>
> . . . .
>
> In accordance with FmHA 1900-B Adverse Decisions and Administrative Appeals, please be advised that all appellants are entitled to an opportunity for a separate informal meeting with the decision maker before the appeal process is begun.
>
> Within seven (7) days of the date of this letter, you may notify the District Office to reserve the right to appeal, and to allow for the opportunity to review any incentives not to prepay. If this notice is not given, appeal must be made within 30 days. Should you appeal and the appeal be denied or should you request an incentive offer, you must show evidence of the nature of the prepayment if actual prepayment cannot be demonstrated no incentives will be offered. The hearing officer would be a member of the National Appeals Staff.

PX A. Mullica emphasizes the phrase "at this time" in the first paragraph of the March 30, 1989 letter to

support its argument that it never received a final denial of its prepayment request. *Id.* According to Mullica, the inclusion of this phrase indicates that FmHA did not reach a final determination. "The March 30, 1989 letter," Mullica argues, "reveals that the October 11, 1988 Mullica letter could not act as a request to trigger accrual of Mullica's claims since the Government's response . . . was not a *final* denial of the request – if it could even be construed as a denial at all." Pls.' Br. filed Dec. 18, 2006, at 12.

The court disagrees with plaintiffs' assessment of the March 30, 1989 letter. The language of the letter, taken as a whole, confirms that Mullica had the right to challenge the determination through an appeals process. It sets forth, in detail, the process for challenging FmHA's initial determination. Mullica was afforded the opportunity to avail itself of the appeals process.[4] To support its position, Mullica characterizes the Supreme Court's finding in *Franconia Associates*, 536 U.S. at 146-47, as a determination that "no breach exists where the Government holds open changing [its] mind." Pls.' Br. filed Dec. 18, 2006, at 12. It concludes that, because the March 30, 1989 letter was not a final decision, FmHA still had the opportunity to change its position. Mullica's characterization of *Franconia Associates*, however, amounts to a reformation of the Supreme Court's ruling. The pertinent language is, as follows:

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[4] The pleadings before the court are silent as to whether Mullica pursued an appeal with FmHA, although pursuit of an agency appeal would be inconsistent with Mullica's position on this issue.

> [J]ust as Congress may announce the Government's intent to dishonor an obligation to perform in the future through a duly enacted law, so may it retract that renouncement prior to the time for performance, thereby enabling the agency or contracting official to perform as promised. Indeed, Congress changed its mind in just this manner before it enacted ELIHPA.

536 U.S. at 131.

A careful reading of the quoted language makes apparent that the Supreme Court was discussing the ability of Congress, not the agency, to "change[] its mind" before being called upon to perform under contract. *Id.* By submitting the October 11, 1988 letter to FmHA, Mullica sought performance. The agency did not deliver as promised. By denying Mullica's prepayment request, the Government caused Mullica's claim to accrue on March 30, 1989. As of that date, the Government dishonored its obligation to accept prepayment and release control over the apartment complex.

Moreover, while the March 30, 1989 letter did not declare that it was a final decision, the text of the letter supports the conclusion that the "process of administrative decision[]making has reached a stage where judicial review will not disrupt the orderly process of adjudication and . . . [the] rights or obligations have been determined or legal consequences [have] flow[ed] from the agency action." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970); *see also Teller Envtl. Sys., Inc. v. United States*, 802 F.2d 1385, 1387 (Fed. Cir. 1986) ("It is well

recognized that the requirement of finality is founded upon a policy that stands against piecemeal litigation and delays caused by appeals of nonfinal decisions."). The court has not been made aware of any effort on the part of Mullica to appeal the March 30, 1989 decision. Instead, Mullica accepted an equity loan, one of the "incentives" offered by FmHA, instead of pursuing an appeal of FmHA's prepayment decision.

2) *Applicability of the statute of limitations to the incentive period*

Plaintiffs' primary argument is that the prepayment requests were "*pro forma*" and "were merely an exercise in following the steps prescribed by the Government to secure 'incentives.'" Pls.' Br. filed Dec. 18, 2006, at 13, 16.

> The mechanistic request for prepayment as part of the "incentives" process thus did not represent the genuine election to declare breach sufficient to convert the Government's repudiation into breach. A breach should be regarded as triggered only when the claimant makes a purposeful and intentional request to prepay which is rejected. The *pro forma* "prepayment" request prescribed by the Government was not the product of the claimants' initiative to declare the Government in breach. It is as if the Government provided a script and tracing paper to the claimants, and then tried to have the result recognized as the original prose of the signatory. To consider the *pro forma* letters a meaningful election to prepay representing the property owner's

> *election* to convert repudiation into breach is to stand reality on its head.

Id. at 17.

During oral argument plaintiffs placed a great deal of emphasis on the term "tender." Counsel for plaintiffs quoted the definitions in Black's Law Dictionary and Williston on Contracts. *See* Tr. at 28-29. Black's Law Dictionary defines the term "tender" as "valid and sufficient offer of performance; specif[ically], an unconditional offer of money or performance to satisfy a debt or obligation. . . . The tender may save the tendering party from a penalty for nonpayment or nonperformance or may, if the other party unjustifiably refuses the tender, place the other party in default." Black's Law Dictionary 1507 (8th ed. 2004). Similarly, Williston on Contracts defines tender as "an unconditional offer of payment consisting of the actual production of a sum not less than the amount due on a particular obligation; tender must be without conditions to which the creditor can have a valid objection or which will be prejudicial to his or her rights." Richard A. Lord, Williston on Contracts, § 72:27 (4th ed. 2006) (footnotes omitted). In summary, plaintiffs argue that, in order to tender payment, they had to demonstrate the ability to prepay. It is their position that they merely began the application process in order to qualify for incentives, such as the equity loan, and never intended the letters submitted to FmHA to be prepayment requests.

Defendant rejoins, first, that plaintiffs' contention that the prepayment requests were not genuine or were in anyway "pro forma" is contrary to plaintiffs' allegations in their complaint. "[Plaintiffs'] allegations

that they accepted incentives 'under duress,' Complaint ¶¶ 11.2, 11.4, make no sense except upon the premise that they would have prepaid their loans rather than accept incentives had they been permitted to do so." Def.'s Br. filed Jan. 3, 2007, at 2-3. A breach therefore occurred when plaintiffs attempted to prepay their loans. At that point the claims accrued because plaintiffs sought performance from FmHA and their request was denied. Secondly, defendant insists that plaintiffs did tender prepayment of their loan obligations. "[Defendant is] not relying simply on the fact that prior to 1992 both of these [p]laintiffs submitted prepayment applications. It's that [plaintiffs] submitted prepayment applications, were offered incentives in lieu of prepayment, and accepted them." Tr. at 44.

Plaintiffs' arguments are unpersuasive. The letters of Messrs. Axelrod and Wanerman cannot be characterized as "pro forma" requests for prepayment. The record establishes that plaintiffs were seeking to prepay their loans and submitted requests as required by FmHA regulations. *See* 7 C.F.R. § 1965.90(b)(1) (1992), and Exhibit E to Subpart B. This does not suffice to support a finding that the letters somehow were intended only as a mechanism to secure incentives.

Furthermore, while plaintiffs contend that they entered into the agreements under duress, they cannot meet the requirements of this legal theory. "To render a contract unenforceable for duress, a party must establish (1) that it involuntarily accepted the other party's terms, (2) that circumstances permitted no other alternative, and (3) that such circumstances were the result of the other party's coercive acts." *N.*

Star Steel Co. v. United States, 477 F.3d 1324, 1334 (Fed. Cir. 2007) (citing *Rumsfeld v. Freedom NY, Inc.* 329 F.3d 1320, 1329 (Fed. Cir. 2003)). Although plaintiffs insist that they accepted the Government's terms involuntarily, and it is arguable that they had no other alternative, plaintiffs cannot satisfy the elements of duress because they have put forward no evidence that the circumstances were the result of coercive acts by the Government. Although plaintiffs could have chosen not to pursue the incentives offered by the Government, by applying for the equity loan, plaintiffs triggered the statute of limitations as to the twenty-year restrictive period. This is consistent with the text of both prepayment requests, which simply and unequivocally request permission to prepay plaintiffs' loans. By submitting these letters to FmHA, plaintiffs tendered prepayment of their outstanding loan obligations. That plaintiffs now claim that the letters were not intended as prepayment requests is immaterial. The letters demonstrate plaintiffs' unconditional offer to prepay their loans with FmHA. Therefore, the court finds that the prepayment request letters satisfy the requirements of tender.

Based on this finding, "the six-year limitations period would commence to run, when . . . the Government then dishonors its obligation to accept the tender and release its control over use of the property securing the loan." *Franconia Assoc.*, 536 U.S. at 133. FmHA's refusal to accept plaintiffs' prepayment request and its refusal to release Government control over the Mullica's property for at least twenty years are demonstrated by the March 14, 1991 letter from Howard Henderson, District Director, FmHA to Mr. Wanerman. The letter states, "Based on the material submitted, it is the determination of [FmHA] that you

have demonstrated the ability to repay your loan in full. As a result of this ability, FmHA is offering a package of one-time incentives so that you may remain in the FmHA multiple family housing loan program . . . ." DX 1 at 7. Similarly, Park Terrace's request was denied for at least a twenty-year period via letter on June 23, 1992, with the "one-time offer of an equity loan in the amount of $ 769,400 as an incentive to keep Park Terrace in low income housing." DX 1 at 7. In these circumstances the statute of limitations began to run on Mullica's claims as to the twenty-year restrictions period on or before June 18, 1991, when Mullica entered into an equity loan with FmHA. The statute of limitations began to run for Park Terrace as to the twenty-year restriction period on or before July 16, 1992, when Park Terrace entered into its equity loan with FmHA.

3) *Plaintiffs' alternative argument as for the period after the twenty-year restrictions expire*

Alternatively, plaintiffs argue that they have claims for damages as to the period following the lapse of the twenty-year restrictive use provisions, but prior to the end of the mortgage term. Plaintiffs characterize the filing of this suit as "an election to treat the repudiation as a breach for the respective partnership claims as to the post-restrictions periods." Pls.' Br. filed Dec. 18, 2006, at 20. Their argument is based on the contention that "the preclusion [of plaintiffs' claims] should only extend to the restrictions period, not the entire loan term, because the putative 'denial' and the operations of the restrictions, by their terms, extends only for the length of the period in which the restrictions were imposed." Pls.' Br. filed Dec. 18, 2006,

at 20 (emphasis omitted). Plaintiffs rely on *Allegre Villa v. United States*, 60 Fed. Cl. 11 (2004), for the proposition that the Court of Federal Claims has allowed plaintiffs with contracts for which the right for prepayment has not yet vested to go forward. *See id.* at 17 ("Contracts with plaintiffs for which the right to prepayment has not yet vested were breached on the date this lawsuit was filed, because those plaintiffs have chosen to treat the Government's repudiation as a breach.").

Defendant counters that the complaint alleges a single repudiation of a single prepayment right. Moreover, defendant distinguishes *Allegre Villa* by arguing:

> [B]orrowers in *Allegre Villa v. United States*, 60 Fed. Cl. 11 (2004), whose prepayment rights were treated as not having "vested." Those borrowers' claims were treated a[s] not having vested because their Section 515 loans contained restrictive use provisions that prevented borrowers from exiting the Section 515 program during the first 20 years of the loan term. . . . The restrictions to which plaintiffs refer are restrictions "undertaken pursuant to the 'incentives'." These restrictions did not come into existence until after the alleged repudiation of the prepayment right contained in plaintiffs' Section 515 loans and after Park Terrace and Mullica submitted prepayment requests but were not permitted to prepay. At the time these requests were submitted, the prepayment rights in question were vested.

Def.'s Br. filed Jan. 3, 2007, at 5-6. Defendant urges a finding that the statute of limitations has run as to the entire period.

This is not a quotidian instance of FmHA's refusing plaintiffs' tender and of plaintiffs sitting on their rights to sue. The Government offered plaintiffs an alternative arrangement that both plaintiffs chose to accept. Defendant's position that, by entering into the equity loan, the statute of limitations accrued as to all of plaintiffs' claims comes close to whipsawing. The alternative offered by the Government did not remedy the initial breach. Therefore, the court finds that, by accepting the Government's offer, plaintiffs' rights to pursue claims as to the period following the twenty-year restrictive use provision have not yet vested. Despite defendant's view to the contrary, *Allegre Villa* is pertinent insofar as it stands for the proposition that plaintiffs can treat the enactment of ELIHPA and the Housing and Community Development Act of 1992 as an anticipatory breach for prepayment rights that have not yet vested. *See* 60 Fed. Cl. at 17.

CONCLUSION

Because the transactional documents cited in footnote 3, *supra*, indicate that plaintiffs Park Terrace Limited and Mullica West Limited entered into equity loans that included restrictive use provisions, the parties are directed to submit briefs on defendant's alternative ground for dismissal based on a failure to state a claim upon which relief can be granted. *See* Def.'s Br. filed Nov. 16, 2006, at 1 n.1. Accordingly, based on the foregoing,

IT IS ORDERED, as follows:

1. Plaintiff shall file with the Clerk of the Court one copy of the transactional documents provided to the court on April 17, 2007. See supra n.3.

2. Defendant shall file its supplemental brief by May 29, 2007.

3. Plaintiffs shall file their supplemental response by June 8, 2007.

4. Defendant's shall file its supplemental reply by June 18, 2007.

s/ Christine Odell Cook Miller

Christine Odell Cook Miller
Judge